Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

Arthur R. Sorkin,
S. Diane Smith,

Petitioners,

v.

County of Santa Cruz,

Respondent.

Petition for Writ of Certiorari
To The California Court of Appeal,
Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

Arthur R. Sorkin
S. Diane Smith
12340 Indian Trail Road
Los Gatos, CA 95030
Telephone: (408) 867-5830

In Propria Persona

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18 pp

QUESTIONS PRESENTED FOR REVIEW

1. May a State, consistent with the Due Process Clause, deprive an individual of the full use and enjoyment of his home, by authorizing a government entity to place a cloud on the title to his real property for an alleged use violation, without notice and an impartial predeprivation hearing?

2. Does *Romer v. Evans* require a "heightened" or "intermediate" degree of scrutiny where there is an Equal Protection/Takings challenge to a zoning ordinance, based on disparate treatment of a politically unpopular group, among others similarly situated?

3. When a government entity seeks civil sanctions for a criminal offense, does the Due Process Clause require that criminal law standards of statutory construction be used?

PARTIES TO THE PROCEEDING

The petitioners in this proceeding are Arthur R. Sorkin and S. Diane Smith. The respondent is the County of Santa Cruz, which is a political subdivision of the State of California.

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DECISIONS BELOW

The Santa Cruz County Superior Court was filed its amended decision on July 28, 1994, which is reproduced at App. B. The judgment of that court filed on August 4, 1994 is reproduced in App. C. The decision of the California Sixth District Court of Appeal, filed on April 23, 1996 and not reported, is reproduced at App. A. The order of the Court of Appeal denying the petition for rehearing, filed on May 15, 1996, is reproduced in App. D. The order of the California Supreme Court denying review, filed July 10, 1996, is reproduced in App. E.

JURISDICTION

The decision of the California Sixth District Court of Appeal, review of which is sought on petition, was entered on July 28, 1996, rehearing was denied on May 15, 1996, review was denied by the California Supreme Court on July 10, 1996 and this Petition for Writ of Certiorari was filed within ninety (90) days of that date.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The Fourth Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fifth Amendment provides in part: "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes at issue are Gov. Code § 25132, Civ. Code § 3491, Pen. Code § 373a, Pen. Code § 836.5, and Pen. Code § 853.6. The administrative rules at issue are California Attorney General's Opinions No. 80-607, 63 Ops. Cal. Atty. Gen. 905 (1980) and No. CR 76-23, 60 Ops. Cal Atty Gen. 83 (1977). The relevant portions are set out in Appendices F and H, respectively.

The ordinances at issue are Santa Cruz County Code, Chapters §§ 1.12, 6.08, 6.12, 6.16, 8.30 and 13.10. The relevant portions of these ordinances are set out at Appendix G, respectively.

Page references are to the versions in the Appendix, which is referred to as App. in the text.

STATEMENT OF THE CASE

A. Procedural History

This is an action to abate and enjoin an alleged zoning violation as a public nuisance. This action was originally filed by respondent County of Santa Cruz in the Santa Cruz County Superior Court, requesting abatement, preliminary and permanent injunctions, and civil penalties for an alleged zoning violation. The Superior Court found for respondent and granted a permanent injunction and civil penalties. Judgment was entered August 4, 1994. Petitioners then appealed the judgment of the Superior Court to the California Sixth District Court of Appeal. On April 23, 1996, the Court of Appeal affirmed the judgment of the Superior Court. Petitioners' petition for rehearing was denied on May 15, 1996. Petitioners then sought review by the California Supreme Court. That court denied review on July 10, 1996.

B. The Case

This case involves a dispute between petitioners and the respondent County of Santa Cruz about the interpretation and enforcement of certain zoning ordinances, which are in apparent conflict, as applied to petitioners property located in Santa Cruz County.

Santa Cruz County Code § 13.10.322(b) is a use chart. One line in the chart shows that in the Residential Agricultural ("RA") zone district, kennels for 5 or more dogs, cats, or combinations thereof, subject to the definition in § 13.10.700(K), require a level V use permit. This provision applies to all parcels in the RA zone.

Another line of the § 13.10.322(b) chart states that "animal keeping," subject to § 13.10.643, is a principal permitted use, requiring *no* use approval. There is no definition of "animal keeping" in the Code, but other Code sections include it as a type of small-scale commercial agriculture. § 13.10.643(a)(3) states that, "On a minimum site of ten acres, the number of animals permitted is not limited, except that no more than six brood sows may be kept on any site."

In 1986, petitioners investigated the purchase of a 14+ acre property in Santa Cruz County. The property is located in an isolated, rural area of the Santa Cruz Mountains, approximately 15 miles from "Silicon Valley", where petitioners are employed. Because of the terrain, there are approximately 100 acres vacant around the property, and the nearest house is approximately 1/4 mile away.

Petitioners were specifically looking for a property where they could keep dogs, cats and other animals and engage in commercial animal husbandry. Prior to purchasing the subject property, petitioners contacted the Santa Cruz County Planning department by telephone, and were told that § 13.10.643(a)(3) applied to the subject property, and that an unlimited number of dogs and cats (and other animals) were allowed.

In 1987, based upon complaints about geese, petitioners had their then attorney again contact the Planning Department to

verify that the information they had previously received was correct. He testified at trial that he was given the same information as petitioners had previously received.

Subsequently, and, as the record shows, after intervention by one or more County Supervisors, the Planning Department changed its interpretation and asserted that § 13.10.322(b) limited the number of dogs and cats to 4 on the subject parcel without a level V use permit. At the same time, they also asserted that geese and peafowl were not permitted at all[1].

On 5/16/88 an employee of the County's Planning Department made a warrantless search of Defendants property and, after hearing some dogs barking inside the house, but without actually seeing any dogs, posted on the entrance to Defendants' property a notice of violation of County ordinance (commonly known as a "red tag"). The notice recited violations of County Code §§ 13.10.275, 13.10.322(b), 13.10.640, "keeping peafowl in a residential zone district," and "unlawfully keeping more than 4 adult dogs."

Such a red tag is a citation under Pen. Code. §§ 836.5 and 853.6. The red tag demanded that the violator contact the County officer issuing the citation in order to meet and present evidence that no violation existed. Petitioners responded in writing, and asserted that there was no violation as a matter of law. Petitioners asserted, based on the Planning Departments' own information, that § 13.10.643(a)(3) governed parcels larger than 10 acres, that no use permit was required and that fowl were specifically called out in § 13.10.643.

No further enforcement steps were taken by the County until January, 1990, when "notice of violation," was recorded against petitioners home without notice[2] or a hearing[3], under the

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[1] The County has since conceded that this assertion was incorrect and that geese and peafowl are not regulated, pursuant to § 13.10.643(a)(3).

[2] The notice provisions of § 13.10.285 do not meet the requirements of service, e.g., personal service or service by certified mail, and, therefore, are insufficient. Considering the extent of the potential deprivation, Due Process demands that a *diligent* effort be made to *actually* notify the interested parties.

authority of California Attorney General's Opinion 80-607, 63 Ops. Cal. Atty. Gen. 905, 912 n.4 (1980)[4] and Santa Cruz County Code §§ 13.10.285 and 13.10.288[5]. The record below shows that this notice of violation placed a cloud on the title to petitioner's real property, and was, in effect, a lien. Subsequently, no further enforcement steps were taken by the County until August 1992, when an inspection warrant was executed against the subject property. Petitioners continued to maintain their position that there was no violation, and the County filed this action to abate and enjoin the alleged zoning violation as a public nuisance.

At trial, petitioners took the position that there was no Code violation as a matter of statutory construction and that there had been a denial of due process in the County's handling

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In this case, petitioners never received notice of the intent to record. There is no evidence in the record to show that the notice of intent to record was ever posted on the property, as required by § 13.10.285. There is conflicting evidence in the record as to whether or not notice was ever mailed (by ordinary mail).

3 Even if notice is effected, the Code, and, in particular, §§ 13.10.285 and 13.10.288 do not contain any provisions for a hearing, and, indeed, in this case, no hearing was ever held. § 13.10.285's provision allowing for a meeting to be requested with the Planning Department within 20 days in order to present evidence that a violation does not exist does not meet the Due Process requirements for an impartial hearing; the Code specifies no procedure for such a meeting and the Planning Department is, in any case, the accuser and not impartial.

4 The opinion concludes that a "notice of violation" can be recorded under State law *because* it is not a cloud on title, as a matter of law. However, ample evidence was presented below that it is treated as a cloud *in fact* and that the one that the County recorded on petitioners' home had caused a loan application that was otherwise approved to be rejected.

5 These Code sections were enacted in 1986, but because they had never been published, did not take effect until September 1990, 9 months after the County recorded its notice of violation against petitioners.

of the dispute.[6] Petitioners also asserted that under the County's Code interpretation, there was a violation of equal protection of the law because dogs and cats were singled out for special regulation, even on agricultural parcels where an unlimited number of other animals were allowed without regulation. Petitioners also requested that the court grant affirmative relief as to the cloud on the title to their home, based on the denial of due process involved in the recording of it.

The trial court rejected petitioners argument as to statutory interpretation and ruled that there was no denial of due process or equal protection of the laws. The trial court took the position that a violation of the ordinance was a public nuisance *per se*, requiring only that the existence of a violation be proved. The trial court's judgment granted a permanent injunction, plus civil penalties and costs. The trial court also ruled that it did not have to address the issue of affirmative relief in light of the rest of its decision, and ignored the claim of denial of due process involved in the recording of the notice of violation.

Petitioners then appealed the judgment to the 6th District Court of Appeal. On appeal, petitioners raised the same issues and also raised for the first time a number of pure questions of law based on undisputed facts in the record, under the exception stated by the California Supreme Court in *Hale v. Morgan*, 149 Cal. Rptr 375[7]. Among these were the possibility of damages arising from the denial of due process involved in the cloud on title and the applicability of criminal standards of due process and statutory construction because of an underlying criminal offense.

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[6] Petitioners argued, *inter alia*, that the County had denied petitioners due process by, among other things, failing to obtain a Zoning Administrator determination as to the interpretation of the apparently conflicting Code sections, denying petitioners the right to appeal the Code interpretation to the Board of Supervisors, and failing to obtain Board of Supervisors authorization for the suit as a whole or for the request for civil penalties.

[7] This Court affirmed a similar exception in *Fane v. Edenfield*, 945 F. 2d 1514, affirmed 113 S. Ct. 1792 (1993).

The Court of Appeal accepted the trial court's nuisance *per se* theory, affirmed the trial court's judgment and declined to rule on new questions of law that it asserted has not been properly raised at trial, including some aspects of due process. The Court of Appeal disputed petitioners' argument that any criminal law standards of due process were applicable to this case. The Court of appeal decided that there were no statutory ambiguities and that there was no denial of equal protection or due process. The Court of Appeal also took the position that it did not have to consider affirmative relief or damages arising out of the denial of due process resulting from the cloud on title because it was affirming the trial court.

REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING SEIZURE OF REAL PROPERTY WITHOUT NOTICE AND HEARING

As noted above, during an ongoing dispute about an alleged use violation, the County placed a cloud on the title to petitioners home without notice and hearing as a coercive enforcement measure. The Court of Appeal, in affirming the trial court's judgment, declined to order affirmative relief to clear the title and did not consider the issue of damages based on the denial of due process caused by the County's actions.

The Court of Appeal's decision below has the effect of sanctioning a government seizure of real property without notice and hearing, retroactively. This ruling seriously conflicts with

this Court's decision in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), that, absent extraordinary circumstances, seizures of real property without notice and hearing are a denial of due process under the Fifth and Fourteenth Amendments.

The fact that the Court of Appeal ultimately affirmed the decision of the trial court does not negate the denial of due process, "[F]air procedures are not just for the innocent. The question before us is the legality of the seizure, not the strength of the Government's case." *Good* at 505.

The United States Court of Appeals for the 9th Circuit held in *U.S. v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995), and *U.S. v. Real Property Located in El Dorado County*, 59 F. 3d 975 (9th Cir 1995), that the decision in *Good* applies retroactively. Petitioners brought these rulings to the attention of the Court of Appeal, but the Court of Appeal chose not to consider *Good*.

A. *Good* Holds That Interference in Important Non-Possessory Rights of Ownership in Real Property is a Denial of Due Process, Absent Extraordinary Circumstances.

This Court has made it clear that significant interference with rights or ownership, even non-possessory rights, without notice and hearing, is a denial of due process, absent extraordinary circumstances, *Good* at 505.

In *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991), this Court held that a state statute authorizing prejudgment attachment of real property without prior notice and hearing was unconstitutional, absent extraordinary circumstances. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), even the loss of appliances and furniture was significant enough to require a predeprivation hearing.

This Court has identified the right of sale and the right to full use and enjoyment as valuable rights of ownership in real property, *Good* at 501. Even non-possessory interference with these rights is significant. As this Court noted in *Doehr*, non-possessory attachments of real property can have the effect of

impairing the ability to sell the property, can harm the credit rating of the owner, can prevent the owner from using the property as collateral for a loan, or can even place an existing mortgage in technical default. And an inability to refinance or obtain an equity loan could lead to an actual default.

B. *Mathews* Implies that There are no Extraordinary Circumstances Justifying The Failure to Provide Notice and a Hearing.

The right to prior notice and an adversarial hearing is central to due process, not just to protect some abstract right, but to protect the use and possession of property from arbitrary encroachment, *Fuentes* at 80-81, Exceptions are tolerated only in "extraordinary situations where some valid governmental interest is at stake," *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).

This Court has set out a three-part inquiry in *Mathews v. Eldridge,* 424 U.S. 319 (1976) for determining if such extraordinary circumstances exist. *Mathews* requires consideration of the private interest affected by the official action, the risk of erroneous deprivation through the procedures used, as well as the value of additional safeguards, and the Government's interest in dispensing with notice and hearing, including the burden of additional procedural requirements.

The right to maintain control over one's home and to be free from governmental interference is an important private interest, *U.S. v. Karo,* 468 U.S. 705, 714-715 (1984). While placing a cloud on the title to petitioner's home doesn't interfere with possession, it still involves the taking of significant rights of ownership, and, as such, is certainly a greater deprivation than the loss of furniture and appliances[8], something requiring notice and a hearing, *Fuentes* at 81, 96.

The risk of erroneous deprivation are great under the

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[8] Petitioner's equity, which has been frozen for 6 years, is several hundred thousand dollars.

County's procedures. The relevant sections of the Santa Cruz County Code, §§ 13.10.285 and 13.10.288, have no provisions for a hearing of any sort[9]. The record below shows that the County does not treat challenges to its statutory interpretation as requiring an administrative hearing, e.g., by the Zoning Administrator under § 13.10.250 and Chapter § 18.10, and the Court of Appeal ruled that those sections were inapplicable. App. A-7.

These procedures are entirely one-sided, and, therefore, provide no protection for the innocent owner. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (1951). "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision making," *Good* at 502. Even the ex-parte procedure in drug forfeitures involving a magistrate, e.g., *Austin v. U.S.*, 113 S. Ct. 2801 (1993), found to be insufficient in *Good*, provides greater protection than those afforded to petitioners by the County.

The County's interest in being able to avoid the requirement of notice and hearing is minimal. The record below shows that the County took two years after putting a cloud on petitioners' title before taking any further enforcement steps. Clearly, time pressure was not an issue preventing notice and a hearing.

The County may well have an interest in preventing the continued use of a property for an alleged illegal use, but the

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[9] On February 1, 1994, the County amended § 1.12.070(D) to provide for a new procedure for code enforcement involving notice and an administrative hearing. App G-4. The fact that the County felt it necessary to amend the code enforcement procedures to provide for notice and a hearing suggests that they were aware that the procedures set forth in §§ 13.10.285 and 13.10.288 do not meet the requirements of due process.

This amendment came into effect prior to the trial in this case, but the new procedures were not followed in this case. In fact, the County treats the procedures in § 1.12.070(D), as amended, as optional, and the procedures set forth in §§ 13.10.285 and 13.10.288 are still used by the County as an alternative remedy, with no notice and hearing.

method employed by the County does not achieve that result; placing a cloud on the title to the property does not have any direct effect on the alleged violation. It does freeze the equity in the property, but since the cloud has no effect on possession, the owner is free to ignore it. Since the alleged violation at issue in this case is a use violation, sale of the property would have the effect of terminating the violation. Since a cloud on title can prevent the sale of a property, *Doehr* at 2113, the County's procedure can have the paradoxical effect of continuing the violation rather than terminating it. As discussed below in II, subsection C, the means selected are not rationally related to the legislative objective, a violation of due process.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE DEGREE OF SCRUTINY IN EQUAL PROTECTION/TAKINGS CASES, WHERE THERE IS DISPARATE TREATMENT OF A POLITICALLY UNPOPULAR GROUP, AMONG OTHERS SIMILARLY SITUATED.

Numerous decisions of the Court deal with regulatory Takings. This Court has consistently required that land use regulations not be arbitrary or capricious, be grounded in reality, and be reasonably related to a legitimate legislative purpose. The California Sixth District Court of Appeal has sanctioned a "rational basis" standard of review in equal protection/takings cases that disregards the factual basis required by *Nebbia v. People of State of New York*, 54 S. Ct. 505 (1934), *Nordlinger v. Hahn*, 112 S. Ct. 2326, and *Heller v. Doe*, 113 S. Ct. 2637 (1993), substituting hypothesis and speculation for fact and reality, and that ignores disparate treatment of those similarly situated, contrary to *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258 (1985). The Court of Appeal's standard of review is directly at odds with the this Court's recent decision in *Romer*, which requires that the basis for legislation be knowable and not be based merely on a dislike for the group disadvantaged.

A. *Romer* Requires That The Relation Between The Classification Adopted And The Object To Be Attained Be Knowable.

Petitioners argued below that the legislative restriction on dogs and cats has no rational relationship to other permitted uses similarly situated, e.g., buffalo[10] or geese[11]. The Court of Appeal, despite petitioners' argument, concluded that if some rational basis for the restriction can be *imagined*, then the restriction is legitimate and there is no violation of equal protection. App. A-4. The Court of Appeal then hypothesized that dogs have a tendency to run in packs, make noise, and attack animals. App. A-4. The record below does not contain any factual basis for this hypothesis, and petitioners challenged it in their petition for rehearing, *inter alia*, as having no "rational relationship" to the intended legislative purpose and the disparate treatment in relation to other permitted uses, because other animals, which are not regulated, e.g., geese and buffalo, have the same characteristics and can cause the same problems as dogs and cats

On May 20, 1996, after the Court of Appeal denied petitioners petition for rehearing, this Court decided *Romer v. Evans*, 116 S. Ct. 1620 (1996), which struck down a Colorado constitutional amendment restricting the rights of homosexuals. The decision in *Romer* reiterates and strengthens the rational relationship test in equal protection challenges and implies a higher standard of scrutiny where there appears to be disparate treatment of a politically unpopular group.

Because it is based on hypothesis and speculation, rather than facts, the "rational basis" standard, as applied by the Court of Appeal below, utterly fails to establish a substantial

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10 The County conceded below that petitioners are allowed even "1000 geese" on their property.

11 The County conceded below that petitioners are allowed to have a "herd of buffalo" on their property.

relationship between a legislative restriction and the problem that the restriction is designed to alleviate. The actual relation between the classification and the object to be attained simply cannot be determined, contrary to *Romer* at 1627, which requires that it be knowable. This implies that where a single use is singled out for special regulation among other uses similarly situated or where a politically unpopular group is implicated, *some* inquiry into the reasons is required.

B. *City of Cleburne* Requires A Good Reason For Singling Out A Particular Use For Regulation Among Similar Uses.

This Court held in *City of Cleburne* at 3258, that singling out a particular use for a special use permit, when such a permit is not required of other similar uses, cannot be validated if no good reason can be found why said use would affect the interests of the municipality in a way that the other unregulated uses do not; mere negative attitudes regarding the use are not a permissible basis for treating that use differently.

Similarly, in *Heller* at 2642, this Court noted that a classification must have a rational realtionship between the disparity of treatment and some legitimate government purpose.Legislative restrictions must be based upon reality and some inherent characteristic of the class regulated. "True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation," *Heller* at 2643. And, in *Nordlinger* at 2332, this Court noted that the relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational.

Numerous California and federal courts have found a denial of equal protection when the court could not discern a distinction between a regulated use and other uses similarly situated, e.g., see *Elysium Institute, Inc. v. County of Los Angeles*, 232 C.A. 3d 408, 4526 (1991), *Del Monte Dunes v. City of Monterey*, 920 F. 2d 1496, 1508 (1990 9th Cir.); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F. 2d 1398, 1409

(1989 9th Cir); *Lockary v. Kayfets*, 917 F. 2d 1150, 1155 (1990 9th Cir.); *Harrington v. Sonoma County*, 834 F.2d 1488, 1501 (1987 9th Cir.); *Arnel Development Co. v. City of Costa Mesa*, 126 C.A.3d 330, 336 (1981); *Gawizer v. Minier*, 86 C.A.3d 777, 785 (1975); *Carlin v. City of Palm Springs*, 14 C.A.3d 706, 712 (1971).

The Court of Appeal's analysis below is faulty, because it fails to consider whether a "good reason" exists, reflecting some real, pre-existing difference, for singling out dogs and cats for special restriction as compared to other animals *in an agricultural zone*, based on their relative impact on the municipality. A *good reason* is required, not just *any* reason. It is not obvious how, for example, 5 house cats could have a greater impact on the municipality than 1000 geese or a herd of buffalo.

The decision in *Romer* at 1627 states that the relation between the classification adopted and the object to be attained must be knowable and not be adopted with the intent to disadvantage a particular politically unpopular group. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." "If the adverse impact on the disfavored class is an apparent aim of the legislation, its impartiality would be suspect," *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980). "A bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

It is unfortunately true today that dog and cat breeders, and even dog and cat owners, are a politically unpopular group. They are under attack by animal rights activists and pet population activists, such as PETA, who are especially hostile to the breeding of pure-bred dogs and cats. In consequence, many jurisdictions are enacting measures designed to restrict or, even

forbid, the breeding of dogs and cats[12]. The American Kennel Club has even been attacked in the national media.

The County has *no* zone district in which dogs and cats are not singled out for special limitations, not even the *large-scale* commercial agricultural zones intended for *intensive* animal husbandry. This suggests that the aim of the County's zoning legislation is not to regulate land use, but, rather, to disadvantage or harm dog and cat owners and breeders because they are politically unpopular.

The County's regulatory scheme is suspect, because it is both underinclusive and overinclusive. It is underinclusive because it does not include other animals which possess similar characteristics to dogs and cats[13], e.g., buffalo or geese, and it is overinclusive, because it applies equally to a 15 square foot well parcel and a 1000 acre farm, without taking into account the great difference in circumstances between the two[14]. Indeed, the Supreme Court of Georgia, has declared that it is unconstitutionally unreasonable and irrational to limit the number of animals per tract without taking into account the size of the tract, *Avant v. Douglas County*, 319 S.E.2d 442, 443 (Ga. 1984).

Petitioners do not question that regulating actual nuisance is *certainly* a legitimate exercise of police power. However, an arbitrary, numerical restriction is not. The Supreme Court of Kansas, in striking down a 5 cat per parcel limitation, noted that nuisance is not amenable to classification by number or mathematical analysis, and depends, instead on the distinctiveness of the character of the animals and purpose, manner, and consequences of the keeping, *Smith v. Steineauf*, 36 P. 2d 995, 997 (1934). The Supreme Court of Oklahoma in declining to follow *Smith* where there was ample evidence of actual nuisance created by cats, noted that injunctive relief

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12 The County has recently considered such legislation.

13 Except for brood sows.

14 Both are limited to and allowed "4 dogs, cats, or combination thereof."

should be limited to the usage that created the nuisance, *Baudinot v. State*, 340 P.2d 268, 73 A.L.R. 2d, 1027, 1031 (1959). Similarly, the Commonwealth Court of Pennsylvania, in *Com. v. Creighton*, 639 A.2d 1296, 1299 (Pa. Cmwlth 1994), while analyzing a per parcel limitation on cats, noted that proof of actual nuisance was required and that nuisance could not be created by legislative fiat and then banned.

C. *Nebbia* Requires That The Legislative Means Selected Must Have a "Real And Substantial Relationship" To The Object Sought To Be Attained.

Nebbia, at 511, requires that a law cannot be arbitrary or capricious and must have a "real and substantial relationship" between the legislative objective and the means selected to achieve it. In this case, the law in question is a zoning ordinance. That is, it's purpose is to regulate land use so as to group uses according to parcel size, location, topography, population density, and other similar considerations. Within the County of Santa Cruz's zoning scheme, there are a number of agricultural zones where commercial animal husbandry may be practiced, and the number of animals allowed on a single parcel is unlimited. These zones are usually rural, and have a large minimum parcel size[15].

The Court of Appeal's application of "rational basis" leads to absurd results, which their analysis did not address. A 14 acre parcel, such as petitioners', in an agricultural zone is allowed 4 dogs or cats, but can have unlimited number of other animals. 14 acres in a densely populated urban residential area can consist of as many as 70 parcels[16], and, therefore, can have

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15 It was conceded below that petitioners' property lies in one such zone, the "SU" zone, which has the same permitted uses as the "RA" zone, where small-scale commercial agriculture is allowed and where the number of animals (except for brood sows) is unlimited.

16 Five per acre.

as many as 140 dogs and 140 cats,[17] but cannot have most other sorts of animals at all.

The urban density of dogs and cats can be more than 70 times the rural density. There is no reason to believe that urban dogs and cats have different propensities from rural ones or are inherently better behaved. While there may be legitimate governmental interests requiring regulation of dogs and cats, the problems hypothesized by the Court of Appeal below, *i.e.*, dogs running in packs, making noise, and attacking animal, have nothing to do with land use. In fact, the County has specifically addressed the hypothesized problems with a comprehensive scheme of laws dealing with animals, ones that have nothing to do with land use[18], e.g., leash laws[19], noise and barking dog ordinances[20], pooper scooper laws[21], vicious animal laws[22], licensing[23], and, even, kennel and pet shop regulation[24]. These laws have an "essential nexus" to the perceived problems; a

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17 Two dogs and two cats per unit in the R-1 zone with single family housing. The density can actually be much greater in the "R-1", "RB", and "RM" zones, where there are apartment buildings, which allow one dog and two cats *per unit*.

18 Santa Cruz County Code, Title 6, 'Animals'.

19 Santa Cruz County Code § 6.12.020, 'Leash required for dogs off premises'.

20 Santa Cruz County Code § 6.12.090, 'Noisy animals'. However, Santa Cruz County Code §§ 8.30030(B), 'Noise' and 6.12.090(B), 'Noisy Animals', actually exempt noise from commercial agricultural activities, operations or facilities, i.e., animals on a farm, from noise standards.

21 Santa Cruz County Code § 6.12.080, 'Animal defecation prohibited where'.

22 Santa Cruz County Code §§ 6.12.100, 'Harassment, threat or injury by dogs', 6.12.110, 'Dogs killing domesticated animals or other dogs', 6.12.130, 'Livestock--Threat or injury by dogs prohibited', and 6.12.140, 'Vicious animals'.

23 Santa Cruz County Code Chapter § 6.08, 'Licensing'.

24 Chapter 6.16, 'Kennels and Pet Shops', App. G-9, provides for health and safety regulation by the Health Department.

land use restriction based on the "parcel" does not. If problems hypothesized by the Court of Appeal are indeed the object of the special land use restriction in question, then there is certainly no "real and substantial relationship" between the means selected and the object intended to be achieved.

III. THE HEIGHTENED SCRUTINY ISSUE IS AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT

In order for the nation's lower courts to properly adjudicate claims that land use regulations lack a rational basis or fail to advance a legitimate state interest, it is critical that they apply the correct degree of scrutiny. The level of scrutiny is a key factor in determining if the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Equal Protection Clause provides protection to property owners from government regulatory schemes. This is clearly shown by the decision below, where the Court of Appeal's use of a "rational basis" level of review easily led to a decision upholding the County's land use regulation, even though the alleged rational basis was only hypothetical and speculative. The legislative scheme was never analyzed for the possible existence of a politically unpopular group or a good reason for the special restriction compared to other uses similarly situated, even though a more detailed analysis of the legislation establishes that there is no "real and substantial relationship" between the object sought to be achieved and the means selected, or a rational relationship to other permitted uses.

This Court has made it clear that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution, *Lynch v Household Finance Corp.*, 405 U.S. 538, 552 (1972). Lower courts are never going to prevent regulatory abuses by government and provide essential protection to private property if they do not give a higher level of scrutiny to the *substance* of the government's action.

Romer implies that a court cannot simply assume the lowest level of scrutiny is correct; the court must, at the very

least, inquire as to whether an "intermediate" or "heightened" level of scrutiny is applicable to a particular case. The Court of Appeal erred in failing to make this inquiry.

This case illustrates the need for a level of scrutiny that looks beyond the hypothetical and speculative to determine that the legislative objective is knowable and that there is a "real and substantial relationship" between the legislative objective and the means selected to achieve it, *Nebbia*, at 511, in light of the actual facts of the situation and the entire regulatory scheme taken as a whole, and that the aim of the legislation is not to disadvantage a politically unpopular group. The appropriate degree of scrutiny under the Takings and Equal Protection Clauses is a matter of exceptional importance and merits review by this Court.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING DUE PROCESS STANDARDS IN QUASI-CRIMINAL CASES

While this case is civil, the offense upon which it is based is criminal. Gov. Code § 25132 declares any violation of a county ordinance a misdemeanor, unless it is specified to be an infraction by local ordinance. California Attorney General's Opinion CR 76-23, 60 Ops. Cal. Atty. Gen. 83 (1977) declares Gov. Code 25132 operative only where the county explicitly declares a violation to be a misdemeanor or infraction. Santa Cruz County Code §§ 1.12.010 declares any violation to be a misdemeanor, except for a list of exceptions that does not include zoning ordinances in Chapter § 13.10. Santa Cruz County Code § 1.12.050 declares any violation to be a public nuisance, and Civ. Code § 3491 and Pen. Code § 373a make a public nuisance a crime.

The trial court below concluded below that all it had to determine in rendering a decision in this civil case was whether or not a violation of the law had occurredunder its nuisance *pr se* theory. App. B-6. The civil and criminal offenses are, therefore, not just the same, within the meaning of *Blockburger*

v. U.S., 52 S. Ct. 180, but are identical.

This case hinges on the meaning of certain words in light of conflicting provisions of the Santa Cruz County Code. This makes the appropriate standard of statutory construction crucial to rendering a decision. Petitioners argued below that, based on the underlying criminal offense, that criminal standards of statutory construction must be applied, especially the rule-of-lenity and the void-for-vagueness test.

The Court of Appeal's decision states that by applying perceived legislative intent[25], it can reconcile the conflicting provisions of the County Code, §§ 13.10.643(a)(3) and 13.10.322(b). It then concludes that this means there is no ambiguity in the Code[26]. As a result, the Court of Appeal did not apply the rule-of-lenity or the void-for-vagueness test.

The Court of Appeal's analysis is faulty. The Court of Appeal's assertion that there is no ambiguity is contradicted by its own observation that there are conflicting provisions that must be reconciled. App. A-3. Since a law can have only one meaning, the highest applicable standard of statutory construction must apply. It is a denial of due process to apply

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25 There is no written legislative history available for the Santa Cruz County Code. The only applicable statement of intent in the Code itself is found in § 13.10.311(d), which states that agriculture is to be liberally construed.

26 As the Court of Appeal noted in its opinion App. A-2, beehives are *enumerated* in § 13.10.643(a)(2), Animal Keeping. § 13.10.322 states that Animal Keeping is a principal permitted use in the "RA" zone, and Animal Keeping is small-scale *commercial* agriculture. But §13.10.322 also states that "bee-keeping, commercial" requires a Level V permit, subject to the definition found in §13.10.700-B (There is actually no definition involving bees, beehives, or bee-keeping in that section). Therefore, §13.10.643 and §13.10.322 contain conflicting provisions.

This is identical to the ambiguity involving dogs and cats that the Court of Appeal said it could resolve by taking into account legislative intent, except that beehives are explicitly enumerated in § 13.10.643. Since it is normally assumed that when a legislature specifically enumerates something, it meant to include it, it is difficult to see how this ambiguity could be resolved by an appeal to legislative intent.

any other standard.

The burden of proof in criminal and civil proceedings are different. However, for a law to have a different *meaning* in a civil proceeding than in a criminal proceeding would be contrary to due process, equal protection, and the void-for-vagueness standard enunciated by this Court in *Grayned v. City of Rockford,* 92 S. Ct. 2294 (1972), and reaffirmed in *Kolender v. Lawson,*103 S. Ct. 1855 (1983). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." ...."A law must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

A law must be understandable, not just by a legal scholar, such as an appellate court justice, but by an ordinary person. The mere fact that the Court of Appeal had to take into account its perception of legislative intent in order to reconcile conflicting provisions of the Santa Cruz County Code certainly implies that a person of ordinary intelligence would definitely have a problem knowing what is prohibited. The Court of Appeal erred in not applying the void-for-vagueness test to this case.

This Court has held in *U.S. v. Thompson/Center Arms Company,* 112 S. Ct. 2102 (1992), and *Crandon v. U.S.,* 110 S. Ct. 997 (1990), that the rule of lenity applies to statutory ambiguities and conflicting provisions of law in civil actions based upon underlying criminal statutes. The outcome of *Thompson* depended upon the meaning of the terms "firearm" and "making", within the context of the National Firearms Act; if there was no "making", then there was no regulation; if there was "making", there was regulation. This case has a similar problem of statutory construction. If dogs and cats are "animals", within the meaning of Santa Cruz County Code § 13.10.643(a)(3), then there is no regulation and no per parcel limitation. Otherwise, there is a limit of 4. The Court of Appeal erred in not applying the rule-of-lenity in this case.

This Court, in *Hicks v. Feiock,* 108 S. Ct. 1423 (1988) and *In re Winship,* 90 S. Ct. 1068 (1970), has required that criminal standards of due process, such as proof beyond a

reasonable doubt, be applied to quasi-criminal cases. The decision in *Hicks* stated that, "The labels affixed either to the proceeding or to the relief imposed are not controlling ... and will not be allowed to defeat the applicable protection of federal constitutional law." More recently, this Court in *U.S. v. Halper*, 109 S. Ct. 1892 (1989), reaffirmed the holdings in *Hicks* that the labels "civil" and "criminal" are not controlling.

California courts have also required a heightened standard of due process in quasi-criminal cases. In *Ex parte Gould*, 99 C. 360, the California Supreme Court noted, with reference to contempt of court proceedings, that, "Contempt of court is a public offense, and by section 166 of the Penal Code is expressly declared to be a misdemeanor." ...."It is none the less a criminal offense that the statutes authorizes it to be punished by indictment, or information, as well as by summary proceedings provided in sections 1209-1222 of the Code of Civil Procedure."

Since in this case the civil offense is identical to the criminal offense, the label "civil" should not have been used by the Court of Appeal to defeat the applicable criminal standards of due process.

CONCLUSION

For the reasons herein advanced, petitioners respectfully urge this Court to grant the Petition for Writ of Certiorari.

Dated: October 7, 1996

Arthur R. Sorkin
S. Diane Smith
12340 Indian Trail Road
Los Gatos, CA 95030
Telephone: (408) 867-5830

In Propria Persona

Supreme Court, U.S.
FILED

96 570 OCT 7 1996

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States
October Term, 1996

Arthur R. Sorkin,
S. Diane Smith,

Petitioners,

v.

County of Santa Cruz,

Respondent.

Petition for Writ of Certiorari
To The California Court of Appeal,
Sixth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Arthur R. Sorkin
S. Diane Smith
12340 Indian Trail Road
Los Gatos, CA 95030
Telephone: (408) 867-5830

In Propria Persona

Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CRUZ,

Plaintiff and Respondent,

vs.

ARTHUR R. SORKIN, et al.,

Defendants and Appellants.

H0131179

(Santa Cruz County Sup.Ct.No. 124722)
Filed Apr 23 1996

In a zoning enforcement action, the trial court rendered a judgment in favor of plaintiff County of Santa Cruz that permanently enjoined defendants Arthur R. Sorkin and S. Diane Smith from keeping more than four dogs on their property without a permit. The judgment also imposed civil penalties of $2,500 in favor of plaintiff pursuant to plaintiff's zoning ordinance. On appeal, defendants raise a plethora of issues, but the principal question is whether plaintiff's zoning ordinance requires a permit to keep more than four dogs on defendants' property.

PLAINTIFF'S ZONING ORDINANCE

Defendants own a 14-acre parcel of real property in a district zoned "SU" (Special District). According to defendants trial brief, they purchased the property in 1986, immediately began importing animals to breed and house, and have never denied that they breed dogs on the property. (AA 141, 153) The property houses sheep, geese, and peafowl together with dogs. (AA 153) Defendants' deposition testimony, introduced in evidence, established that approximately 30 dogs over the age of 4 months were on the property at the time plaintiff inspected it in August 1992, and at the time the depositions were taken in October 1993.

An SU district allows land uses that are permitted in any "R-1" zone (residential) or "RA" zone (residential agricultural). Santa Cruz County Code section 13.10.322[1] designates the permitted uses in R1 and RA zones by means of a "Residential Use Chart."

The chart has a subdivision entitled "Animal-related uses." The subdivision identifies five categories of animal-related uses: animal keeping; animal raising; cats and dogs; kennels (5 or more dogs or cats over 4 months old); and stables. The subdivision indicates that animal keeping, animal raising, and four dogs (or cats or combination thereof) are permitted on property zoned RA. It also indicates that a permit is required for maintenance of a kennel on property zoned RA.

The subdivision also states that animal keeping is further subject to section 13.10.643.

Section 13.10.643 pertains to the minimum acreage required when keeping animals in an RA zone. It states that, on a minimum site of one acre, no more than two per acre of horses, cows, hogs, or a combination thereof may be kept; and, on a minimum site of one-half acre, no more than four per acre of sheep, goats, or combination thereof may be kept and no more than one hundred per acre of fowl, rabbits, or similar small animals except mink.[2] It then adds: "On a minimum site of ten acres, the number of animals permitted is not limited, except that no more than six brood sows may be kept on any site."

Defendants contend that section 13.10.643 "authorizes them to have an unlimited number of adult dogs and cats without a permit, since the number of all kinds of animals, except brood sows, is unlimited without permit." At the very least, defendants argue that the ordinance as a whole is ambiguous and rules of construction favor their interpretation. Defendants' analysis is erroneous.

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1 Further unspecified references to "section" are to the Santa Cruz County Code.

2 On a minimum site of one-half acre "beehives" are also permitted.

"The construction and interpretation of a statute are questions of law which we necessarily consider de novo. . . [¶] The fundamental rule of statutory construction is that the court ascertain the intent of the Legislature[3] from an examination of the statute as a whole. [Citations.] We do this in order to be certain that our construction and application of the statute will effectuate the purpose of the law. [Citation.] This process requires that we first look to the plain meaning of the words used and their juxtaposition by the Legislature [citation]; and we are bound to give effect to a statute according to the usual and ordinary import of those words." (County of Los Angeles v. Superior Court (1993) 18 Cal.App.4th 588, 594, fn. omitted.) "[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.) To this end, the literal language of an enactment may be disregarded to avoid absurd results and give effect to the manifest purposes which appear from the provisions considered as a whole. (People v. Souza (1993) 15 Cal.App.4th 1646, 1652.) If more than one reasonable construction of the statutory language is nevertheless possible, "then we should look at the legislative history and other extrinsic aids to determine the legislative purpose and adopt the construction which most closely serves it." (County of Los Angeles v. Superior Court, supra, 18 Cal.App.4th at pp. 594595, fn. omitted.)

When these principles are applied to plaintiff's ordinance, it is apparent that the ordinance unambiguously prohibits maintaining more than four dogs on property zoned RA without a kennel permit.

First, the language of section 13.10.322 clearly singles out dogs for special treatment and limits the number of dogs permissible in the RA zone without a permit to four.

And second, the rule of giving effect to all provisions of a statute leads only to a conclusion that the language of section 13.10.322 controls over the language of section 13.10.643. This

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3 The rules of construction used for interpreting statutory enactments apply equally to interpreting ordinances. (See County of Madera v. Superior Court (1974) 39 Cal.App.3d 665, 668.)

follows because the literal language of section 13.10.643 (allowing unlimited dogs on RA property because unlimited animals are allowed) emasculates the dog limitation language of section 13.10.322; on the other hand, the dog limitation language of section 13.10.322 does not negate section 13.10.643 since this latter section is simply read to apply unless its terms or other ordinance provisions (like section 13.10.322) make exceptions.

Since there is no ambiguity in plaintiff's ordinance, there is no need for judicial construction.

EQUAL PROTECTION

Defendants make a constitutional challenge to plaintiff's ordinance as above interpreted. They contend that the ordinance denies them equal protection of the law: "There is no rational basis for singling out dogs and cats for special regulation in a district specifically zoned for agriculture and animal keeping, because any possible reason for regulating dogs and cats would apply equally (or more so) to every other sort of animal, which are not regulated." They seize upon plaintiff's concession below that, under section 13.10.643, they could maintain a "herd of buffalo" on their property. Again, defendants' analysis is erroneous.

A statute is presumed constitutional, and the burden is on the one attacking the statute to negate every conceivable basis which might support it whether the basis has a foundation in the record or not. (Heller v. Doe By Doe (1993) 509 U.S. 312 [113 S.Ct. 2637, 2643].) Stated another way, in the face of an equal protection challenge, a classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (Id. at p. 2642.)

Defendants simply fail in their burden. Dogs and cats are different from buffalo and the like: the former are generally considered to be domestic pets; the latter are generally considered to be farm animals raised for food and fiber. When together in groups, dogs in particular are known to run in packs, attack farm animals, and bark incessantly. In contrast, farm animals tend toward docility. Defendants' arguments, e.g., that dogs can be raised for fiber and farm animals can run in herds, pose danger, and make noise, do not negate that domestic pets

are generally different from farm animals. It is simply not irrational to treat these two types of animals differently. "A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality."' [Citation.] 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.' [Citations.]" (Heller v. Doe By Doe, supra, 113 S.Ct. at p. 2643.)

DUE PROCESS

Defendants contend that the trial court denied them criminal law due process safeguards (privilege against self-incrimination and guilt proved beyond a reasonable doubt). They point out that plaintiff's zoning ordinance provides that violation of its provisions is a misdemeanor. They reason that the civil nature of the proceedings against them is therefore not controlling.

Defendants did not make this challenge in the trial court. Under orthodox rules of appellate procedure defendants have therefore waived the point for appeal. (See In re Andre P. (1991) 226 Cal.App.3d 1164, 1169-1170 [acknowledging the general rule against considering points on appeal not raised in the trial court, observing that out-of-state authority on application of the general rule to constitutional challenges is split, but electing not to decide the question].)

In any event, we disagree with the authorities cited by defendants for the proposition that a civil zoning enforcement action is sufficiently criminal in nature to trigger criminal due process safeguards.

Defendants principally rely upon In re Winship (1970) 397 U.S. 358, Hicks v. Feiock (1988) 485 U.S. 624, and United States v. Halper (1989) 490 U.S. 435.

The question answered affirmatively in Winship was whether "proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which could constitute a crime if committed by an adult." (In re Winship, supra, 397 U.S. at p. 359, fn. omitted.) The consequence that a juvenile might lose his or her liberty was the

court's motivation to conclude that a juvenile delinquency proceeding, despite its civil nature, was analogous enough to a criminal proceeding to require constitutional criminal law safeguards. Here, the consequences of having to use land according to lawful zoning ordinances and paying a penalty for violating lawful zoning ordinances are not analogous to a loss of liberty.

The question in Hicks, a habeas corpus proceeding after a father was held in contempt for failure to comply with a child support order, was whether a legislative presumption of ability to pay child support violated due process principles forbidding a court from employing certain presumptions that affect the determination of guilt or innocence in criminal proceedings. The court answered the question affirmatively if the substance of the proceeding and kind of relief afforded could be characterized as criminal in nature (punishing, e.g., unconditional imprisonment or unconditional payment of fine to court) and negatively if the substance and relief could be characterized as civil in nature "remedial, e.g., imprisonment until performance of act, payment of fine to complainant, or payment of fine to court conditional upon performance of act). As we have indicated, the nature of this zoning enforcement proceeding posed no risk that defendants would lose their liberty. And no fine payable to the court was possible or imposed. As such, the proceeding was not criminal in nature requiring criminal due process safeguards.

Halper merely announced the rule that, under double jeopardy principles, a defendant who has already been punished by a criminal conviction cannot be subjected to an additional civil sanction to the extent that the sanction is punishing rather than remedial.

ADMINISTRATIVE REMEDIES

Defendants contend that plaintiff failed to follow its own administrative procedures before filing the complaint and that the failure constitutes a (1) failure to exhaust administrative remedies, or (2) denial of due process of law. There is no merit to this claim.

Defendants rely upon section 13.10.250 which charges plaintiff's zoning administrator with the responsibility for interpretation of the ordinance subject to appeal to the Board of

Supervisors. And they seem to claim that they were entitled to a written interpretation from the zoning administrator that, if adverse, they could appeal administratively.

Defendants' position, however, is based on nothing more than the language of section 13.10.250 providing that the zoning administrator "shall be responsible" for interpretation. That the zoning administrator is responsible for interpreting the zoning ordinance does imply that any particular procedure must be followed to carry out the responsibilities. Defendants cite no other section for the proposition that the zoning administrator must give a written interpretation in a case such as this except section 18.10.230, subdivision (c). But this section operates when a citizen applies for a permit to vary his or her use from uses permitted under the zoning, not when a citizen violates a zoning ordinance. (§ 18.10.110 ["This Chapter establishes procedures for County review and approval of permits for development projects and of changes in planning policies and regulations. The types of permits and approvals which are required are defined in this Chapter. This Chapter also establishes seven levels of standardized processing procedures for the review of permits and policy amendments."].) (AA 288) Defendants also ignore section 13.10.280, subdivision (e), which declares land uses against the ordinance to be nuisances and authorizes the district attorney or county counsel, upon written request of the planning director or order of the planning commission or board of supervisors, to "immediately commence action or proceedings for the abatement, and removal and enjoinment thereof, in the manner provided by law . . . ."

NO CAUSE OF ACTION PROVED

Defendants argue that plaintiff's ordinance cannot properly declare their dog breeding a nuisance per se subject to permanent injunction. They pose that proof of actual nuisance was required. They rely on People v. Cooper (1944) 64 Cal.App.2d Supp. 946, Civil Code section 3482.5, Code of Civil Procedure section 731a, and Civil Code section 3369. Defendants' analyses are erroneous.

In Cooper, the defendant was a veterinarian operating an animal hospital who was criminally charged under a general statute with maintaining or committing a public nuisance. The

statute limited its reach to offenses "the punishment for which is not otherwise prescribed." (People v. Cooper, supra, 64 Cal.App.2d Supp. at p. 948.) A specific statute applied to persons maintaining or committing a public nuisance on their own property after being given reasonable notice to abate by the district attorney or health officer. It was conceded that no notice was given to the defendant, so the court reversed the defendant's conviction. It reasoned that the specific statute controlled and the defendant's omission to abate the nuisance was wherein he offended the law. (Id. at p. 949.) In this context the court stated: "The mere possession of dogs or cats does not create a nuisance per se [sic]. [Citation.] Although appropriate civil remedies might have been resorted to by way of abatement of any such alleged nuisance, the defendant, without being given the opportunity of remedying the claimed evils through notice that they were offensive to his neighbors, found himself under arrest charged with the commission of a crime." (Id. at p. 949.)

Thus, Cooper does not support defendants' proposition: (1) it was a criminal prosecution, not a zoning enforcement action; (2) no zoning statute regulating maintenance of dogs or cats applied; (3) nothing in the case prohibits the state from declaring maintenance of dogs or cats over a certain number to be a nuisance per se (or, at the very least, a violation of a zoning ordinance); and (4) the case in any event recognized that a civil action to abate a nuisance for maintaining dogs could have been properly brought.

Civil Code section 3482.5, subdivision (a)(1), states: "No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began."

Defendants credit their testimony that in 1986 they learned from an employee in plaintiff's planning department that the number of allowed dogs and cats on their property was unlimited. They reason that their dog breeding activity was not a nuisance at the time they began it and it continued for more than three years before plaintiff declared having more than four dogs on RA property a nuisance.

The trial court, however, accepted plaintiff's evidence: Mark Deming testified that section 13.10.642 (regulations for maintenance of kennels) was first enacted in 1966 and amended twice in 1982 and once in 1983. The written ordinance contains notations to that effect. We are bound by the trial court's resolution of the conflicting evidence. (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 60.)

Code of Civil Procedure section 731a generally prohibits anyone, except the People of the State of California in an action to abate a public nuisance, from- obtaining an injunction against — a business operating as permitted in a commercial zone without evidence of unnecessary and injurious methods of operation. Defendants reason that plaintiff is a person, not the People, and therefore could not prevail on a per se nuisance theory.

This claim is patently without merit. A county is a body politic whose powers are exercised as a department of the state exercising powers belonging to the state with the authority of the state. (County of Sierra v. Butler (1902) 136 Cal. 547, 550-551 [action to enjoin obstruction of highway properly brought in name of county].) And the state has specifically given counties the authority to abate nuisances. (Gov. Code, § 25845, subd. (a) ["The board of supervisors, by ordinance, may establish a procedure for the abatement of a nuisance . . . ."]; see also Gov. Code, § 38771 [giving cities same authority].)

Civil Code section 3369 prohibits injunctive relief against violation of a penal law unless violation of the law constitutes a nuisance. Defendants claim that since violation of plaintiff's zoning ordinance is a crime (misdemeanor) plaintiff is required to prove that their violation constituted a nuisance.

Defendants are incorrect. "When use of a parcel violates applicable zoning rules, the responsible agency may obtain abatement -- i.e., removal of the violation and restoration of legal use -- even when substantial expense is involved." (IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal. 4th 81, 89; see also City of Stockton v. Frisbie & Latta (1928) 93 Cal.App. 277, 289 ["it is thoroughly established that a municipal corporation or a county or a township may, in certain instances, by direct action on its part, invoke an appropriate civil remedy to coerce obedience to the mandates of its ordinances or regulations adopted in the exercise of the police power as

expressly granted to it by the constitution"].)

CAPACITY TO SUE

Defendants contend that plaintiff lacked capacity to sue because there was no evidence showing that the board of supervisors, planning director, or planning commission approved bringing suit as required by section 13.10.280, subdivision (e).

Defendants' contention is more properly one attacking the county counsel's lack of authority, not plaintiff's lack of capacity. (Pillsbury v. Karmgard (1994) 22 Cal.App.4th 743, 757 [lack of capacity is a disability, like infancy or insanity, that deprives a party of the right to come into court].)

The claim has no merit in any event since defendants failed to raise the issue below.

A claim of lack of attorney-authority is an affirmative defense for which the party attacking counsel's authority has the burden of proof. (Corcoran v. Arouh (1994) 24 Cal.App.4th 310, 316 ["absent evidence of lack of authority, an ostensible agency may be found to exist when counsel makes an appearance for and purports to act on behalf of a litigant"].) The defect is waived if not pleaded and proved in the trial court. (Cf. Danziger v. Peebler (1948) 88 Cal.App.2d 307, 311 [challenge to bankruptcy trustee's authority to sue waived by failure to raise issue at trial]; Rosenbloom v. Southern Pac. Co. (1922) 59 Cal.App. 102, 104 [complaint failed to show wife's authority to sue for death of child (erroneously described as lack of capacity); defect waived by failure to demur].) In both of the cases relied upon by defendants the issue was raised and litigated in the trial court. (Ventura County v. Clay (1897) 119 Cal. 213 [dismissal granted for lack of authority]; Contra Costa v. Soto (1902) 138 Cal. 57 [non-quit granted for lack of authority].)

STATUTE OF LIMITATIONS

Plaintiff's complaint was filed in 1993. Defendants contend that a four-year statute of limitations applies to actions brought by a county (Code Civ. Proc., § 345) and that some of the events sued upon occurred before 1989.

There is no merit to any statute of limitations issue. Defendants admitted in their deposition testimony that they presently maintained approximately 30 dogs on their property. This evidence supports an inference that defendants' zoning violation was a continuing nuisance. "Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages and injunctive relief until the nuisance is abated, even though an action based on the original wrong may be barred by the statute of limitations." (Wade v. Campbell (1962) 200 Cal.App.2d 54, 61.)

DOUBLE JEOPARDY

Defendants claim that criminal law principles of double jeopardy require reversal of the judgment. They base their argument upon that plaintiff placed a lien upon their property in 1990 for the very violations sued upon herein. Defendants failed to raise double jeopardy as an affirmative defense and have therefore waived this issue for appeal. (People v. Franklin (1976) 56 Cal.App.3d 18, 23.)

EVIDENTIARY RULINGS

Defendants first claim that the trial court failed to ruled on their motion in limine seeking to limit admission of certain evidence. They admit, however, that their counsel agreed with the trial court to take up the issues via motions to strike. They continue that the trial court ruled in their favor at trial to exclude evidence of "an inspection warrant that was improperly executed by force." Their challenge is apparently to "admissibility of evidence taken from other illegal searches." They cite no portion of the record, however, where they made any motion to strike such evidence. We therefore deem the matter waived. (Haynes v. Gwynn (1967) 248 Cal.App.2d 149, 151.)

Defendants also argue that the trial court erroneously admitted their deposition testimony over objection[4]. They

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[4] Because violating plaintiff's zoning ordinance is a misdemeanor, defendants refused to testify at trial about the number of dogs they housed. They asserted their Fifth Amendment privilege against self-incrimination; however, they

maintain that their deposition testimony was involuntary because (1) plaintiff "should not have been allowed to depose" them, (2) plaintiff's counsel told them at the deposition that all objections were reserved for trial, and (3) their attorney believed that "all objections [to deposition questions] were reserved for trial." There is no merit to these claims.

First, defendants failed to take measures to prevent their depositions. Second, defendants fail to cite any portion of the record supporting their statement that plaintiff's counsel told them that their objections were reserved for trial. And third, defendants fail to cite any authority for the proposition that their counsel's erroneous view about the necessity to assert privilege objections at depositions renders their deposition testimony involuntary for the purposes of excluding it at a zoning enforcement trial.

Defendants also contend that the trial court erroneously excluded their proffered evidence tending to show that their zoning violation was not an actual nuisance. The ruling was patently correct since the evidence was irrelevant. As we previously pointed out, plaintiff was entitled to an injunction simply by force of the violation of its zoning ordinance. (IT

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had not claimed this privilege at their deposition.

"The protection of information from discovery on the ground that it is privileged . . . is waived unless a specific objection to its disclosure is timely made during the deposition." (Code Civ. Proc., § 2025, subd. (m)(1).) And the deposition of a party may be used against that party at trial of the action. (Code Civ. Proc., § 2025, subd. (u)(2).)

Defendants cite People v. Lawrence (1959) 168 Cal.App.2d 510, for the proposition that they can object to prior testimony on Fifth Amendment grounds. Lawrence is inapposite. In that case, a witness testified substantively on voir dire but invoked the Fifth Amendment when called as a trial witness by the defendant. The court found no waiver of the privilege because existing authority established that a witness testifying at a preliminary examination or before a grand jury (proceedings analogous to voir dire) did not waive the privilege against self incrimination for a subsequent trial. Here, existing authority establishes that failure to assert the privilege at a deposition is a waiver.

Corp. v. Solano County Bd. of Supervisors, supra, 1 Cal.4th at p. 89.)

Defendants next claim that the trial court erroneously excluded their proffered evidence of a "booklet published and distributed by the United States Department of Agriculture." According to defendants, the evidence would have tended to show that raising dogs is an agricultural use which would in turn have supported their claim that raising dogs constituted animal keeping within the meaning of plaintiff's ordinance.

Defendants sought to introduce this evidence via a request to take judicial notice of the publication. They claim that judicial notice was mandatory under Evidence Code sections 453 (judicial notice of matters specified in section 452 mandatory upon request) and 452, subdivision (c). We disagree.

Evidence Code section 452, subdivision (c), provides for judicial notice of "Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." A U.S.D.A. booklet is by no means an "official act" of the Department of Agriculture.

STATEMENT OF DECISION

Defendants contend that the trial court's statement of decision is deficient because it fails to state facts supporting the conclusion reached. There is no merit to this contention.

The only material disputed fact in this case was whether defendants housed more than four dogs on their property, i.e., operated a kennel without a permit. The amended statement of decision states that defendants indeed had more than four dogs and therefore operated a kennel without a permit. Moreover, it also cites the supporting evidence, i.e., defendants' deposition admissions.

AFFIRMATIVE RELIEF

Defendants complain that the trial court erred by failing to grant them affirmative relief and expunge the lien placed on their property by plaintiff. We fail to see any error. The effect of the judgment is to affirm the validity of the lien. Defendants are entitled to expungement of the lien only upon satisfactory proof

that their zoning violation has been corrected. (§ 13.10.288.)

COSTS

After entry of judgment the trial court denied defendants' motion to tax costs and awarded plaintiff $3,702.13. Defendants challenge the order but they filed no appeal from it. The order denying defendants' motion is clearly an order made after judgment that must be separately appealed. (Code Civ. Proc., § 904.1, subd. (a)(2); Rappenecker v. Sea-Land Service. Inc. (1979) 93 Cal.App.3d 256, 261.)

JUDICIAL DISQUALIFICATION

Defendants contend that the trial court had an undisclosed possible conflict of interest and appearance of bias mandating reversal. They cite matters outside the record: after the trial, but before issuance of the statement of decision and judgment, the trial judge lost a contested election for his seat; before taking his seat the judge had been employed by the district attorney; and plaintiff, as the one who had been tendering the judge his paychecks, was the judge's employer.

Defendants pose that a reasonable man would entertain doubts about the judge's impartiality. This follows, so the argument goes, because the judge undoubtedly desired job references from plaintiff, the district attorney, or both and would therefore be motivated to find in plaintiff's favor.

We reject defendants' contention at the threshold because it is based on matters outside the record. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 250, p. 256.) Although defendants mention in passing that we could take judicial notice of the matters, they never made a formal request that we do so. (Evid. Code, § 459.)

DISPOSITION

The judgment is affirmed.

/s/ Premo, Acting P.J.

WE CONCUR:

/s/ Elia, J.

/s/ Wunderlich, J.

Appendix B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

COUNTY OF SANTA CRUZ,
a Political Subdivision of
the State of California,

Plaintiff,

vs.

No. 124722
AMENDMENT TO
STATEMENT OF
DECISION

ARTHUR R SORKIN, DIANE S. SMITH, etc.,

Defendants.

The above matter came on for court trial on March 16, 1994 in Department 11 of the above entitled court. Harry Oberhelman, Assistant County Counsel appeared for plaintiff; John Perkins appeared on behalf of defendants.

Defendants property consists of approximately 14 acres and it is located in a Special Use (SU) zone. In a SU district the permitted uses are those that would be permicted in any Residendial Agricultural (RA), or Residential (R-1) Zone District. The zoning restrictions for the R-1 Zone District prohibit entirely the keeping of more than four dogs or cats, or combination thereof, and, without a Level V permit, kennels for five or more dogs or cats over the age or four months.

A kennel is defined in Santa Cruz County Code Section 13.10.700 (k) as follows:

> "Any lot, building structure, enclosure or premises whereupon or wherein are kept five or more dogs, cats, or similar small animals over the age of four months in any combination for more than five days, whether such keeping is for pleasure, profit, breeding, or exhibiting and including places where dogs or cats or similar small animals in any combination are boarded, kept for sale or kept for hire."

It is undisputed the defendants have no Level V development permit for the maintenance of a kernel.

Plaintiff seeks a permanent injunction alleging that the defendants keep more than five dogs on their property and operate a kennel thereon. Plaintiff also seeks civil penalties. Defendants defend on a number of grounds. First, defendants argue that under the County Code their specific use of the property is permissible without a permit Second, they challenge the County's zoning regulations on equal protection grounds Third, defendants claim estoppel and laches. Fourth, they challenge the Inspection Warrant and evidence obtained therefrom on several bases (1) that it was obtained without reasonable or probable cause; and (2) that it was improperly executed. Defendants also raise the constitutionality of a recorded Notice of Violation and they complain that the plaintiff failed to first institute abatement proceedings under the County Code.

Under Santa Cruz County Code §1.12.050, abatement proceedings for a public nuisance are discretionary on the part of the County and not a mandatory prerequisite to a claim for injunctive relief.

The Court addresses the Inspection Warrant next because the ruling on that affects the state of the evidence. The Court finds the warrant was based on reasonable or probable cause. However, the Court also finds the execution of the warrant in violation of Civil Code of Procedure Section 1822.56 in that there was a threat of the use of force in the service of the warrant, Pursuant to the case of People v. Tillery (1989) 211 CA3d 1569, 1581, the Court further finds the evidence resulting from the warrant should be excluded because the interests and policies underlying the statutory scheme of the administrative warrant would otherwise be frustrated. The statutory intent to avoid violent confrontations was significantly jeopardized by the threat of forcible entry. The mere fact the confrontation did not occur here does not require a different result. Statutory policies are compromised to a similar degree whether force is actually utilized or just threatened, warranting exclusion in either case.

In the absence of that evidence, the Court still fings that defendants had more than four dogs on their property and that they operated a kennel as defined under the County Code. The admitted portions of their deposition testimonies as well as their statements during the trial sufficiently establish these findings.

Turning to the defendants' contention that their activities constitute a permitted use under the zoning regulations applicable to the SU zone district, the Court disagrees.

The allowed uses in RA and R-1 zones are set forth in Santa Cruz County Code Section 13.10.322. One specifically permitted use is animal keeping, subject to Section 13.10.643. Another permitted use is animal raising, family, subject to Section 13.10.644. A third permitted use is the keeping of four cats or dogs without a permit, or, with a permit and subject to Section 13.10.642, the maintenance of a kennel for five or more dogs or cats over the age, of four months.

Defendants contend that their dog breeding operation is specifically permitted under Santa Cruz County Code Section 13.10.643, which permits keeping an unlimited number of animals on a lot exceeding ten (10) acres. Defendants' reason that the classifications of "cats and dogs " and "kennels" although listed separately in the Residential Uses Chart must necessarily be included within either or both "small scale commercial agricultural", and "animal keeping"; thereby becoming themselves subject to Section 13.10.643 and allowed without a permit because defendants' parcel is larger than ten (10) acres.

Defendants' argument is unpersuasive. It contradicts the clear statutory scheme which in the Residential Uses Chart segregates and delineates the treatment of these various uses. Additionally, many of the categories are specifically made subject to another section. There is no such reference with respect to "cats and dogs " but kennels for five or more dogs or cats over the age of four months are subject to Section 13.10.642. Notably there is no mention of Section 13.10.643 as in the case of animal keeping. In view of this omission and the specific listing of " cats and dogs " and "kennels" the reasonable statutory construction and interpretation is that these categories are a limitation on the other provisions allowing the keeping of animals rather than subsumed into those other categories and within their interpretation and application.

Defendants further challenge the County's zoning regulation on equal protection grounds. They argue that the County's regulations of dogs in the RA Zone District is infirm because the different treatment accorded this classification of animal from other types of animals is arbitrary, capricious or irrational. The Court disagrees.

All that is required in this situation not involving a fundamental right or suspect classification is a rational basis for the different treatment among the various animals. The burden is on the defendants to demonstrate that a zoning classification is arbitrary. They have failed to do this. Moreover, if the classification is fairly debatable the regulation must be upheld. Horlinger v. Hahn (1992) 120 L.Ed. 2nd 1.

The Supreme Court recently set out the equal protection analysis required under the rational relationship test in Heller v. Doe (1993) 113 S.Ct. 2637, 2642-1643:

> We many times have said, and but weeks ago repeated, that rational- basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," Nor does it authorize "the judiciary [to] sic as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines," For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection" challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record, Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between

> means and ends. A classification does not fail rational-basis review because it " 'is not made with mathematical nicety or because in practice it results in some inequality.' " "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." , . True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.

Dogs and cats are distinguishable from the other types of animals in that they are almost exclusively considered to be domesticated pets whereas most of the other animals are principally involved in the production of food and fiber. Because of their clear domesticated status issues such as noise and excrement are arguably different, Moreover, especially with respect to dogs, there is a propensity to run in packs and attack farm animals which is particularly important considering multiple livestock and fowl keeping is allowed in the same zone district. Dogs in greater numbers, especially in close contact as in a kennel, could compound the noise factor, Lastly, but not completely, the operation of a kennel could impact the neighborhood with increased traffic in the area.

Under the standard as explicitly defined in the Heller case and in light of the burden of proof on the issue, the Court finds the Santa Cruz County Code does not run afoul of the equal protection clause as it relates to dogs and kennels.

Defendants allege as an affirmative defense that the County is estopped to seek enforcement of its zoning ordinance. The claim of estoppel is based on the alleged conversation that defendant Sorkin had with an unidentified Planning Department employee wherein he was told before he purchased the property that there was no limit on the number of animals including dogs. Defendants bear the burden of proof on the estoppel defense. Additionally, estoppel will not be applied when to do so would nullify a strong rule of policy adopted for the benefit of the public. Anza Parking Corp. v. City of Burlingame (1987) 195 CA3d 855, 861. On the basis of these rules and the case of Pettit v. City of Fresno 34 CA3d 813, the Court finds the plaintiff is not estopped to seek enforcement of the applicable zoning ordinance.

Lastly, defendants contend the Notice of Violation

recorded on January 19, 1990 should be expunged. Plaintiff argues defendants are not entitled to this type of relief under their pleadings. The Court finds such relief could be granted if warranted under the defendants' Answer and Prayer for such other and further relief as the court may deem just and proper. However, in ruling in favor of plaintiff on the preliminary injunction, it is not necessary to rule on the validity of the Notice of Violation. Defendants have now had their full hearing on these issues. Upon satisfactory proof of compliance with this ruling defendants have codified procedures available to them to expunge the Notice of Violation (§13.10.288).

The Court finds that the keeping of dogs greater in number of four on the subject property and the maintenance of a kennel without a Level V development permit from the County of Santa Cruz constitutes a public nuisance. The Court grants a permanent injunction enjoining defendants and each of them as well as their agents, servants and all persons acting under or in concert with or for them, from operating a kennel and from keeping dogs in numbers exceeding four on the subject property unless or until all development permits required under the Santa Cruz County Code have been obtained. Civil penalties are imposed pursuant to County Code Section 1.12 .070 (a) in the amount of $2,500 and plaintiff is awarded costs of suit.

DATED 7/28/94

/s/ GEORGE J. KOVACEVICH
Judge of the Superior Court

Appendix C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ

COUNTY OF SANTA CRUZ,
a Political Subdivision of
the State of California,

Plaintiff,

vs.

No. 124722
JUDGMENT AFTER
TRIAL BY COURT
Filed Aug 4 1994

ARTHUR R SORKIN, DIANE S.
SMITH, and DOES 1 THROUGH 20,
inclusive,

Defendants.

The above case came on for court trial on March 16, 17, 21, 22 land 23, 1994, before the Honorable George J. Kovacevich. Harry Oberhelman, Assistant County Counsel, appeared on behalf of Plaintiff and John S. Perkins, House, House & Perkins appeared on behalf of Defendants.

The Court having heard and considered the testimony and documentary evidence and the argument of counsel, the matter having been submitted for decision and the Court having issued its Statement of Decision, the Court grants judgment for Plaintiff and against Defendants as follows:

1. Defendants, and each of them, as well as their servants, agents and all persons acting under or in concert with or for them, are permanently enjoined from keeping dogs in numbers exceeding four on that real property identified as 12340 Indian Trail Road, Santa Cruz County, California, APN: 088-201-13 unless and until all necessary permits required under the Santa Cruz County Code have been obtained.

2. Defendants, and each of them, as well as their servants, agents and all persons acting under or in concert with or for

them, are permanently enjoined from operating a kennel, on that real property identified as 12340 Indian Trail Road, Santa Cruz County, California, APN: 088-201-13,- unless -and until all necessary permits required under Santa Cruz County Code have been obtained. Kennel is defined to be the use of any lot, building structure, enclosure or premises whereupon or wherein there are kept five or more dogs, cats or similar small animals over the age of four months in any combination for more than five days, whether such keeping is for pleasure, profit, breeding, or exhibiting and including places where dogs or cats or similar small animals in any combination are boarded, kept for sale or kept for hire.

3. Defendants pay to the Plaintiff the sum of $2,500 civil penalties.

4. Plaintiff is awarded its costs of suit.

Dated: 7/29/94

GEORGE J. KOVACEVICH
Judge of the Superior Court

Appendix D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CRUZ,
a Political Subdivision of
the State of California,

Plaintiff and Respondent,

vs.

No. H013179

Superior Ct. No. 124722
Filed May 15 1996

ARTHUR R SORKIN, DIANE S. SMITH, and DOES 1 THROUGH 20, inclusive,

Defendants and Appellants.

BY THE COURT*

The appellants' petition for rehearing is denied.

Dated May 15 1996

/s/ Premo, J.
Acting P.J.

* Before Premo, Acting P.J., Elia J., and Wunderlich, J.

Appendix E

Sixth Appellate District No. H013179
S053973

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CRUZ, Respondent

vs.

Filed Jul 10 1996

ARTHUR R SORKIN, et al., Appellants

Appellants' petition for review is DENIED.

/s/ George
Chief Justice

Appendix F

CALIFORNIA STATUTES

CIV §3491. Remedies

The remedies against a public nuisance are:

1. Indictment or information;

2. A civil action; or,

3. Abatement.

CIV §3492.

Remedy by Indictment or Information

The remedy by indictment or information is regulated by the Penal Code.

GOV §25132.

(a) Violation of a county ordinance is a misdemeanor unless by ordinance it is made an infraction. Such a violation may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action.

(b) Every violation determined to be an infraction is punishable by (1) a fine not exceeding one hundred dollars ($100) for a first violation; (2) a fine not exceeding two hundred dollars ($200) for a second violation of the same ordinance within one year; (3) a fine not exceeding five hundred dollars ($500) for each additional violation of the same ordinance within one year.

PEN §373a.

Every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, and every person occupying or leasing the property or premises of anotherwhomaintains, permits or allows a public nuisance to exist thereon, after reasonable notice in writing from a health officer or district attorney or city attorney or prosecuting attorney to remove, discontinue or abate the same has been served upon such person, is guilty of a misdemeanor, and shall be punished accordingly; and the existence of such nuisance for each and every day after the service of such notice shall be

deemed a separate and distinct offense, and it is hereby made the duty of the district attorney, or the city attorney of any city the charter of which imposes duty upon the city attorney to prosecute state misdemeanors, to prosecute all persons guilty of violating this section by continuous prosecutions until the nuisance is abated and removed.

PEN §836.5.

(a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a misdemeanor in his presence which is a violation of a statute or ordinance which the officer or employee has the duty to enforce.

(b) There shall be no civil liability on the part of, and nocause of action shall arise against, any public officer or employee acting pursuant to subdivision (a) and within the scope of his authority for false arrest or false imprisonment arising out of any arrest which is lawful or which the public officer or employee, at the time of the arrest, had reasonable cause to believe was lawful. No such officer or employee shall be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or overcome resistance.

(c) In any case in which a person is arrested pursuant to subdivision (a) and the person arrested does not demand to be taken before a magistrate, the public officer or employee making the arrest shall prepare a written notice to appear and release the person on his promise to appear, as prescribed by Chapter 5C (commencing with Section 853.6). The provisions of that chapter shall thereafter apply with reference to any proceeding based upon the issuance of a written notice to appear pursuant to this authority.

(d) The governing body of a local agency, by ordinance, may authorize its officers and employees who have the duty to enforce a statute or ordinance to arrest persons for violations of such statute or ordinance as provided in subdivision (a).

(e) For the purpose of this section, "ordinance", includes an order, rule, or regulation of any air pollution control district.

(f) For purposes of this section, a "public officer or employee" includes an officer or employee of a nonprofit transit corporation wholly owned by a local agency and formed to carry out the purposes of the local agency.

PEN §853.6.

(a) In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter. If the person is released, the officer or superior shall prepare in duplicate a written notice to appear in court, containing the name and address of the person, the offense charged, and the time when, and place where, the person shall appear in court. If, pursuant to subdivision (i), the person is not released prior to being booked and the officer in charge of the booking or his or her superior determines that the person should be released, the officer or superior shall prepare a written notice to appear in a court.

In any case in which a person is arrested for a misdemeanor violation of a protective court order involving domestic violence, as defined in subdivision (b) of Section 13700, the person shall be taken before a magistrate instead of being released according to the procedures set forth in this chapter, unless the arresting officer determines that there is not a reasonable likelihood that the offense will continue or resume or that the safety of persons or property would be imminently endangered by release of the person arrested. Prior to adopting these provisions, each city, county, or city and county shall develop a protocol to assist officers to determine when arrest and release is appropriate, rather than taking the arrested person before a magistrate. The county shall establish a committee to develop the protocol, consisting of, at a minimum, the police chief or county sheriff within the jurisdiction, the district attorney, county counsel, city attorney, representatives from domestic violence shelters, domestic violence councils, and other relevant community agencies.

Nothing in this subdivision shall be construed to affect a defendant's ability to be released on bail or on his or her own recognizance.

(b) Unless waived by the person, the time specified in the notice to appear shall be at least 10 days after arrest if the duplicate notice is to be filed by the officer with the magistrate.

(c) The place specified in the notice shall be the court of the magistrate before whom the person would be taken if the requirement of taking an arrested person before a magistrate were complied with, or shall be an officer authorized by that court to receive a deposit of bail.

(d) The officer shall deliver one copy of the notice to appear to the arrested person, and the arrested person, in order to secure release, shall give his or her written promise to appear in court as specified in the notice by signing the duplicate notice which shall be retained by the officer. Upon the signing of the duplicate notice, the arresting officer shall immediately release the person arrested from custody.

(e) The officer shall, as soon as practicable, file the duplicate notice, as follows:

(1) It shall be filed with the magistrate if the offense charged is an infraction.

(2) It shall be filed with the magistrate if the prosecuting attorney has previously directed the officer to do so.

(3) The duplicate notice and underlying police reports in support of the charge or charges shall be filed with the prosecuting attorney in cases other than those specified in paragraphs (1) and (2).

If the duplicate notice is filed with the prosecuting attorney, he or she, within his or her discretion, may initiate prosecution by filing the notice or a formal complaint with the magistrate specified in the duplicate notice within 25 days from the time of arrest. If the prosecution is not to be initiated, the prosecutor shall send notice to the person arrested at the address on the notice to appear. The failure by the prosecutor to file the notice or formal complaint within 25 days of the time of the arrest shall not bar further prosecution of the misdemeanor charged in the notice to appear. However, any further prosecution shall be preceded by a new and separate citation or an arrest warrant.

Upon the filing of the notice with the magistrate by the officer,

or the filing of the notice or formal complaint by the prosecutor, the magistrate may fix the amount of bail which in his or her judgment, in accordance with Section 1275, is reasonable and sufficient for the appearance of the defendant and shall indorse upon the notice a statement signed by him or her in the form set forth in Section 815a. The defendant may, prior to the date upon which he or she promised to appear in court, deposit with the magistrate the amount of bail set by the magistrate. At the time the case is called for arraignment before the magistrate, if the defendant does not appear, either in person or by counsel, the magistrate may declare the bail forfeited, and may, in his or her discretion, order that no further proceedings shall be had in the case, unless the defendant has been charged with violation of Section 374.3 or 374.7 of this code or of Section 11357, 11360, or 13002 of the Health and Safety Code, or a violation punishable under Section 5008.7 of the Public Resources Code, and he or she has previously been convicted of a violation of that section or a violation which is punishable under that section, except in cases where the magistrate finds that undue hardship will be imposed upon the defendant by requiring him or her to appear, the magistrate may declare the bail forfeited and order that no further proceedings be had in the case.

Upon the making of the order that no further proceedings be had, all sums deposited as bail shall immediately be paid into the county treasury for distribution pursuant to Section 1463.

(f) No warrant shall be issued for the arrest of a person who has given a written promise to appear in court, unless and until he or she has violated that promise or has failed to deposit bail, to appear for arraignment, trial, or judgment or to comply with the terms and provisions of the judgment, as required by law.

(g) The officer may book the arrested person prior to release or indicate on the citation that the arrested person shall appear at the arresting agency to be booked or indicate on the citation that the arrested person shall appear at the arresting agency to be fingerprinted prior to the date the arrested person appears in court. If it is indicated on the citation that the arrested person shall be booked or fingerprinted prior to the date of the person's court appearance, the arresting agency at the time of booking or fingerprinting shall provide the arrested person with verification of the booking or fingerprinting by either making an entry on the citation or providing the arrested person a verification form established by the arresting agency.

If it is indicated on the citation that the arrested person is to be booked or fingerprinted, the magistrate, judge, or court shall, before the proceedings begin, order the defendant to provide verification that he or she was booked or fingerprinted by the arresting agency. If the defendant cannot produce the verification, the magistrate, judge, or court shall require that the defendant be booked or fingerprinted by the arresting agency before the next court appearance, and that the defendant provide the verification at the next court appearance unless both parties stipulate that booking or fingerprinting is not necessary.

(h) A peace officer shall use the written notice to appear procedure set forth in this section for any misdemeanor offense in which the officer has arrested a person without a warrant pursuant to Section 836 or in which he or she has taken custody of a person pursuant to Section 847.

(i) Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease, in which case the arresting officer may release the person, or the arresting officer shall indicate, on a form to be established by his or her employing law enforcement agency, which of the following was a reason for the nonrelease:

(1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.

(2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.

(3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.

(4) There were one or more outstanding arrest warrants for the person.

(5) The person could not provide satisfactory evidence of personal identification.

(6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or

offenses, would be jeopardized by immediate release of the person arrested.

(7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

The form shall be filed with the arresting agency as soon as practicable and shall be made available to any party having custody of the arrested person, subsequent to the arresting officer, and to any person authorized by law to release him or her from custody before trial.

(j) Once the arresting officer has prepared the written notice to appear and has delivered a copy to the person arrested, the officer shall deliver the remaining original and all copies as provided by subdivision (e).

Any person, including the arresting officer and any member of the officer's department or agency, or any peace officer, who alters, conceals, modifies, nullifies, or destroys, or causes to be altered, concealed, modified, nullified, or destroyed, the face side of the remaining original or any copy of a citation that was retained by the officer, for any reason, before it is filed with the magistrate or with a person authorized by the magistrate to receive deposit of bail, is guilty of a misdemeanor.

If, after an arrested person has signed and received a copy of a notice to appear, the arresting officer determines that, in the interest of justice, the citation or notice should be dismissed, the arresting agency may recommend, in writing, to the magistrate that the charges be dismissed. The recommendation shall cite the reasons for the recommendation and shall be filed with the court.

If the magistrate makes a finding that there are grounds for dismissal, the finding shall be entered in the record and the

charges dismissed.

Under no circumstances shall a personal relationship with any officer, public official, or law enforcement agency be grounds for dismissal.

(k) For purposes of this section, the term "arresting agency" includes any other agency designated by the arresting agency to provide booking or fingerprinting services. [Am 1993, c 589, c 995]

Appendix G

SANTA CRUZ COUNTY CODE

SANTA CRUZ COUNTY CODE, CHAPTER 1.12

GENERAL PENALTY AND ENFORCEMENT

1.12.010 Code violations deemed misdemeanors—Continuing violations.

It is unlawful, and constitutes misdemeanor, for any person to violate, or to fail to comply with, any provision of the Santa Cruz County Code unless otherwise specified. It shall be a separate offense for each and every day during any portion of which any violation of, or failure to comply with, any provision of this code is committed, continued or permitted. (Prior code § 1.08.010: Ord.1532, 7/21/70)

1.12.020 Infractions—Violation of administrative provisions.

Acts denominated infractions shall not be deemed to be misdemeanors. Administrative provisions appearing in Chapter 1.16, Title 2, Title 3, Chapters 4.28 through 4.48 and Chapter 7.56 of the Santa Cruz County Code shall not be deemed to be criminal offenses unless specifically denominated infractions or misdemeanors. (Prior code § 1.08.020: Ord. 1532, 7/21/70)

1.12.030 Penalty for misdemeanors.

Any person convicted of a misdemeanor, the penalty for which is not otherwise prescribed, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment. (Ord.3620 § 1,1986: Ord. 3602 § 1, 1985: prior code § 1.08.030: Ord. IS32, 7/21/70)

1.12.040 Penalty for infractions.

A. Acts denominated infractions shall not be punishable by imprisonment. Every violation determined to be an infraction is punishable by:

1. A fine not exceeding one hundred dollars for a first violation;

2. A fine not exceeding two hundred dollars for a second

violation of the same provision of the County Code within one year,

3. A fine not exceeding five hundred dollars for each additional violation of the same provision of the County Code within one year.

B. A person charged with an infraction shall not be entitled to a trial by jury. A judgment that a person convicted of an infraction be punished by fine may also provide for the payment to be made within a specified time or in specified installments, contingent upon the person giving his written promise to either pay the fine as provided or to appear in court on the due date. Any person who willfully violates any such written promise is guilty of a misdemeanor. (Ord. 3517 § 1, 1984: prior code § 1.08.040: Ord. 1532, 7/21/70; Ord. 2685, 5/22/79)

1.12.050 Violations deemed public nuisance-Abatement

A. Any condition caused or permitted to exist in violation of any of the provisions of this code shall be deemed a public nuisance and may be abated as such by the county in accordance with this code and state law.

B. In addition to the penalties herein provided, upon entry of a second or subsequent civil or criminal judgment within a two-year period finding that an owner of property is responsible for a condition that may be abated in accordance with this code except for conditions abated pursuant to Section 17980 of the Health and Safety Code, the court may order the owner to pay treble the costs of abatement. (Ord. 4070 § 1, 1990: prior code § 1.08.050: Ord. 1532, 7/21/70)

1.12.060 Violations—Effect on permit issuance.

Applications for permits pursuant to provisions of the Santa Cruz County Code may be denied or conditionally approved if related violations of the Santa Cruz County Code or state law are found to exist. (Prior code § 1.08.070: Ord. 2366, 11/30/76)

1.12.070 Code violations-Civil penalties.

A. Any person who violates or fails to comply with any provision of the Santa Cruz County Code shall be liable for a civil penalty not to exceed two thousand five hundred dollars for

each violation or failure to comply. It shall be a separate offense for each and every day during any portion of which any person knowingly and intentionally commits, continues or permits a violation of any provision of the Santa Cruz County Code.

B. Any person who constructs or converts a structure for human habitation without a building or development permit required by any provision of the Santa Cruz County Code shall be liable for a civil penalty in the amount of any rent received from any person occupying the illegal structure, or, in the alternative, in the amount of the reasonable rental value of the structure from the date of its construction or conversion.

C. The county counsel, upon obtaining authorization from the board of supervisors of the county, may prepare and file a civil action on behalf of the county in any court of competent jurisdiction to recover the civil penalties provided by this section. Any penalties recovered by the county counsel under subsection B in excess of the total county costs of enforcement shall be deposited in the county's affordable housing fund. All other penalties recovered by the county counsel under this section in excess of the total county costs of enforcement shall be deposited in the county's general fund.

D. The remedies and civil penalties provided by this section shall be in addition to any other remedies and penalties provided by law. (Ord. 4110 § 1 (part), 1991; Ord. 3991 § 1, 1989: Ord. 3951 § 1, 1988)A

ORDINANCE NO. 4290

ORDINANCE AMENDING SECTION 1.12.070 OF THE SANTA CRUZ COUNTY CODE RELATING TO COUNTY CODE ENFORCEMENT

The Board of Supervisors of the County of Santa Cruz ordains as follows:

SECTION I

Subsection D. of Section 1.12.070 of the Santa Cruz County Code is hereby amended to read:

D. The Board of Supervisors may provide one or more hearing officers to conduct hearings, to issue subpoenas, to receive evidence, to administer oaths, to rule on questions of law and the admissibility of evidence, to prepare a record of the proceedings, to issue enforcement orders with regard to violations of the County Code or of specified chapters of the County Code, and to provide for the recovery of enforcement costs, any civil penalties, and any other costs of abatement as a special assessment against the property on which the violation(s) occurred or as a personal obligation of the person committing or permitting the violation(s). Written notice of the time, date, and location of the hearing shall be given by personal service or certified mail to the person or persons alleged to have violated the County Code, and to any other person known to own or possess the property, at least fifteen days prior to the date of the hearing. The notice shall also state the County Code provisoes alleged to have been violated; a description of the property on which the alleged violation has occurred, including the parcel number used by the Assessor on the current roll; the name and address, if known, of the person alleged to have committed or permitted the violation(s) and of the property owner and other person, if any, in possession of the property; the estimated costs of enforcement, other abatement costs, and civil penalties proposed to be made a special assessment against the property and collected on the tax roll or to be collected as a personal obligation; and the name, address, and telephone number of the department or agency issuing the notice to which protests, or objections, or other communications may be directed. The hearing officer may continue the hearing determined appropriate by the hearing officer. In conducting the hearing, the hearing officer shall give weight to the administrative

interpretation of an ordinance provision by the department charged with its enforcement unless that interpretation is shown to be clearly erroneous or unauthorized. At the conclusion of the hearing held on the alleged violation(s), the hearing officer shall have the authority to render a decision, supported by written findings, which:

1. Determines whether the alleged violation(s) of the County Code have been committed or permitted by the person given notice;

2. Orders the payment of the total amount of the County's enforcement costs and other abatement costs by any such person found to have committed or permitted the violations;

3. Orders the payment of civil penalties to be paid by any such person found to have committed or permitted the violations;

4. Orders action to be taken to correct any violations by any such person found to have committed or permitted the violations.

5. Determines whether any enforcement costs, other abatement costs, and civil penalties are to be made a special assessment against the property on which the violation(s) occurred and collected on the secured tax roll, or are to be the personal obligation of the person committing or permitting the violation and collected on the unsecured tax roll.

SECTION II

This ordinance shall take effect on the 31st day after the date of final passage.

PASSED AND ADOPTED this 1st day of February, 1994, by the Board of Supervisors of the County of Santa Cruz by the following vote:

AYES: SUPERVISORS Beautz, Symons, Belgard, Keeley and Patton
NOES:. SUPERVISORS None
ABSENT: SUPERVISORS None

SANTA CRUZ COUNTY CODE, CHAPTER 6.08

LICENSING

6.08.010 Dog licensing requirements—Term of license.

A. Dogs shall be licensed within thirty days of obtaining the age of four months, or within thirty days of acquisition by the owner, whichever occurs later.

B. Licenses shall be valid for twelve months from date of issuance and shall be issued upon payment of the fee set by resolution of the board of supervisors.

C. Licenses issued under prior existing county ordinances shall remain valid until expiration.

D. No license shall be issued unless proof of antirabies vaccination is presented and is valid for the license period.

E. A license may be sold for less than the full twelve-month license period if the antirabies vaccination expires prior to the full license period. Fees for partialterm licenses will be pro-rated on a monthly basis, with a minimum fee of five dollars to cover administrative costs. (Ord. 3675 § 2, 1985: prior code § 8.05.300: Ord. 540,12/10/57; Ord.1220, 12/20/66; Ord.2170,8/19/75; Ord.2259, 3/16/76)

6.08.020 Vaccination—Requirements.

Every owner of any dog over the age of four months within the limits of Santa Cruz County shall, at intervals specified by the California State Department of Health Services, procure the vaccination of the dog by a licensed veterinarian with an approved canine antirabies vaccine. (Ord. 3675 § 4, 1985: prior code § 8.05.310: Ord. 1220, 12/20/66; Ord. 2170, 8/19/75; Ord.2259, 3/16/76)

SANTA CRUZ COUNTY CODE, CHAPTER 6.12

6.12.010 Dogs at large prohibited. Exceptions.

It is unlawful for the owner of any dog, whether licensed or unlicensed, to permit or allow such dog to be at large anywhere in the unincorporated area of Santa Cruz County. The provisions of this section shall not apply to:

A. A dog at large on any ranch or similar undeveloped property with permission of the property owner, and

B. A dog entered in a dog show or field trials, and under the reasonable control of a competent person. (Ord. 3728 § 19, 1986: prior code § 8.05.400: Ord. 2170, 8/19/75)

6.12.020 Leash required for dogs off premises.

It is unlawful for the owner of any dog, whether licensed or unlicensed, to permit or allow such dog to be away from the premises of its owner at any time if not securely restrained by a leash. (Ord.3728 § 20, 1986: prior code § 8.05.401: Ord. 1371,10/29/68; Ord.1447, 7/25/72; Ord. 2170, 8/19/75)

6.12.080 Animal defecation prohibited where.

It is unlawful for the owner of any animal to allow or permit such animal to defecate on any public property or improved private property, other than that of the owner. (Prior code § 8.05.420: Ord. 2170, 8/19/75)

6.12.090 Noisy animals.

A. It is unlawful for any person to keep or harbor any dog, cat or other animal, whether licensed or not, which by habitual howling, yelping, barking or other noise unreasonably disturbs or annoys any person with ordinary sensitivities. When determining if there has been a violation of this section, the use and character of the property where the animal is located as well as the neighboring properties shall be taken into consideration.

B. Notwithstanding any other provisions of this section, commercial agricultural activities, operations or facilities shall be exempt from the provisions of this section to the extent provided by Section 3482.5 of the California Civil Code. (Ord. 3979 § 1,

1989: prior code § 8.05.460: Ord. 540, 12/10/57 Ord. 2170, 8/19/75)

6.12.100 Harassment, threat or injury by dogs.

It is unlawful for the owner of any dog to suffer or permit the same to annoy and harass, chase, threaten to inflict, or inflict injury of any kind on any person. (Prior code § 8.05.410: Ord. 2170, 8/19/75)

6.12.110 Dogs killing domesticated animals or other dogs.

It is unlawful for the owner of any dog or other domesticated animal to suffer or permit the same to cause the death of another dog or other domesticated animal, except where the offending animal is acting in self-defense, or where the incident occurs on the property of the owner of the offending animal. The poundmaster may impound any dog or domesticated animal found at large in violation of this section, and the poundmaster may declare the dog or domesticated animal to be a vicious animal and proceed under the procedure set forth in Section 6.24.070 of the Santa Cruz County Code. (Prior code § 8.05.412: Ord. 3060, 4/14/81)

6.12.130 Livestock or wild game— Threat or injury by dogs prohibited.

It is unlawful for the owner of any dog to suffer or permit the same, under any circumstances, to chase, threaten to inflict, or inflict injury of any kind on any wild game, as defined in Fish and Game Code Section 3950, or on any domestic livestock, including cows, sheep, horses and chickens. (Prior code § 8.05.415: Ord. 2170, 8/19/75)

6.12.140 Vicious animals.

It is unlawful to permit any vicious animal to go unrestrained. Any vicious animal may be required by written order of the poundmaster to be confined to its owner's premises, and allowed at liberty only under the direct control of its owner while on a leash and properly muzzled to prevent harm or injury to the public. (Prior code § 8.05.430: Ord. 2170, 8/19/75

SANTA CRUZ COUNTY CODE, CHAPTER 6.16

KENNELS AND PET SHOPS

6.16.010 Definitions.

A. "Kennel" means any person, firm or corporation engaged in the commercial business of breeding, buying, selling or boarding of dogs and cats. Any person, firm or corporation who shall keep upon its premises more than two female dogs or more than one female cat for breeding purposes shall be considered as operating a kennel.

B. "Pet shop" means any person, firm or corporation operating an establishment where live animals and/or birds are kept for sale as domestic pets. (Prior code § 11.44.010: Ord. 540, 12/10/57)

6.16.020 Permit—Required.

No person shall operate any kennel or pet shop as defined in this chapter without first obtaining a permit from the health officer. The granting of such permit shall be within the discretion of the health officer, taking into consideration the type of construction as it relates to sanitation and the manner in which animals, birds or fowl are to be housed, zoning regulations, and the character of the person making the application. (Prior code § 11.44.020: Ord. 540, 12/10/57; Ord. 1662, 12/14/71)

6.16.030 Permit—Application, fees, expiration and delinquency.

A. Applications. Applications for a permit to operate a kennel or a pet shop, or for renewal thereof, shall be filed with the health officer upon such forms as he may prescribe.

B. Fees. The permit fee for the calendar year or any part thereof during which the permitted activity is carried on and the fee for renewal thereof shall be that established by resolution of the board of supervisors.

C. Plan Check Charge. The applicant shall pay the plan check charge established by resolution of the board.

D. Expiration of Permits. Each permit shall expire on December 31st of the current year, provided such permit may be renewed without penalty on or before February 15th next following the expiration date.

E. Delinquent Permits. Permittees who do not renew the permit on or before February 15th shall pay the extra amount established by the board. (Prior code § 11.44.030: Ord.540,12/10/57; Ord.1662, 12/14/71)

6.16.040 Permit—Exceptions to fees.

The provisions of this chapter requiring the payment of an annual license fee shall not apply to an animal shelter maintained and operated by a society for the prevention of cruelty to animals duly incorporated under Title 1, Division 2, Part 4, of the Corporation Code of the state of California. (Prior code § 11.44.040: Ord. 540, 12/10/57)

6.16.050 Permit—Suspension or revocation.

Any permit issued under this chapter may be revoked or suspended if. after due investigation, the health officer finds that:

A. The permittee, his agent or employee has been convicted of any offense involving the violation of Section 597 of the Penal Code of the state or any provision of this chapter, or

B. The permittee, his agent or employee has, at the place for which the permit was issued, failed to provide any animal, fowl or reptile in his possession, care or control with proper and sufficient food, drink, shelter or protection, or subjected any such animal, fowl or reptile to needless suffering, unnecessary cruelty, or abuse; or

C. The permittee, his agent or employee, has failed to maintain the premises in a clean and sanitary condition; or

D. The permittee, his agent or employee, has violated any rule or regulation of the health officer. (Prior code § 11.44.050: Ord. 540. 12/10/57)

6.16.060 Permit—Notice of suspension or revocation.

The health officer may order an immediate suspension of any

permit granted under this chapter for a period of ten days; said order shall set forth the finding of the board. The health officer shall not revoke a permit granted under this chapter unless written notice of a hearing on such revocation is served upon the owner, occupant or other person in charge of the permittee's business, at least five days before the hearing by the health officer on the revocation of said permit. Where, after diligent search, such owner. occupant or person in control cannot be found, a copy of such notice shall be mailed to the permittee at said place of business at least five days before the hearing on the revocation of the permit. No person shall operate said business in the unincorporated limits of the county during any time in which the permit for such business has been suspended or revoked. (Prior code § 11.44.060: Ord. 540. 12/10/57)

6.16.070 Appeal—Procedure.

The owner or operator of any kennel or pet shop who shall be aggrieved by any action of the health officer may take an appeal to the board of supervisors. Notice of such appeal shall be in writing, and filed with the health officer and the board of supervisors on or before ten days after the action of the health officer appealed from, and shall state the grounds upon which said appeal is based. (Prior code § 11.44.070: Ord. 540. 12/10/57)

6.16.080 Appeal—Hearing—Notice.

A. Upon receipt of such notice of appeal, the board of supervisors shall hear the appeal within sixty days after such notice. Written notice of the time and place of hearing on the appeal shall be given by the clerk of the board of supervisors to the appellant and to the health officer, and upon receipt of said notice of hearing, the health officer shall forward to the board of supervisors all papers and records related to the appeal and relating to all proceedings had by the health officer in connection with appellant's case.

B. Upon the hearing of the appeal, the board of supervisors may take such aetion or make such order as said board of supervisors may deem just and proper in the disposition of said appeal. (Prior code § 11.44.080: Ord. 540, 12/10/57)

SANTA CRUZ COUNTY CODE, CHAPTER 8.30

NOISE

8.30.010 Curfew—Offensive noise.

A. No persons shall, between the hours of ten p.m. and eight a.m., make, cause, suffer, or permit to be made any offensive noise:

1. Which is made within one hundred feet of any building or place regularly used for sleeping purposes; or

2. Which disturbs any person of ordinary sensitivities within his or her place of residence.

B. "Offensive noise" means any noise which is loud, boisterous, irritating, penetrating, or unusual, or that is unreasonably distracting in any other manner such that it is likely to disturb people of ordinary sensitivities in the vicinity of such noise, and includes, but is not limited to, noise made by an individual alone or by a group of people engaged in any business, meeting, gathering, game, dance, or amusement, or by any appliance, contrivance, device, structure, construction, ride, machine, implement, instrument or vehicle. (Ord. 4001§1 (part), 1989)

8.30.020 Subsequent offense within forty-eight hours.

Any person who violates any section of this chapter and is cited for such a violation, and who within forty-eight hours after receiving such a citation again violates the same section, is guilty of a misdemeanor. A person is cited for a violation when he or she is issued and signs an infraction or misdemeanor citation, or when he or she is arrested and booked, or when a complaint is filed and the person is notified of the filing of such a complaint. (Ord. 4001 § 1 (part), 1989)

8.30.030 Exceptions.

A. The provisions of this chapter shall not apply to any noise from any specific type of activity for which special noise regulations are provided by any other provision of the county code.

B. The provisions of this chapter shall not apply to any noise caused by farming operations carried out on any land designated within the Santa Cruz County General Plan for commercial agricultural use. (Ord. 4001 § 1 (part), 1989)
4001 § 1 (part), 1989)

SANTA CRUZ COUNTY CODE, CHAPTER 13.10

13.10.250 INTERPRETATION

The Zoning Administrator shall be responsible for the interpretation of the provisions of this Chapter for their application to any specific case or situation, interpretation of whether a proposed use is essentially the same as a use allowed in the zone district, or interpretation of the boundary location of a zone district, based on the following guidelines, subject to appeal to the Board of Supervisors pursuant to Chapter 18.10:

(a) In interpreting and applying the provisions of this Chapter, they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience, and general welfare.

13.10.285 RECORDING NOTICE OF VIOLATION

Whenever the Planning Department determines there has been a violation of this chapter, the Planning Department may provide a notice of intent to record a notice of code violation to the owner of the property upon which the violation is located.

Notice shall be provided by posting on the property and by mail at the address shown on the latest assessment roll or at any other address of the owner known to the Planning Department.

The notice shall state that within twenty (20) days of date of the notice, the owner may request a meeting with the Planning Department to present evidence that a violation does not exist.

In the event a meeting is not requested and the violation has not been corrected, or in the event that after consideration of the evidence the Planning Department determines that violation of this chapter in fact exists, the Planning department may record a Notice of Violation in the office of the County recorder.

Appeals to the determinations of the Section shall be processed in accordance with Section 18.10.320.

13.10.288 FEES

At the request of any affected property owner, the Planning Department shall issue a notice of expungement of violation upon satisfactory proof the violation noticed hereunder has been corrected.

The fee for checking, inspection, and verification of compliance and correction of any such violation, and recording of notice of expungement of such violation shall be set by resolution of the Board of Supervisors.

13.10.310 AGRICULTURAL DISTRICTS

13.10.311 PURPOSES.

(a) "CA" Commercial Agriculture.

The purposes of the "CA" Commercial Agriculture Zone District are to preserve the commercial agricultural lands within Santa Cruz County which are a limited and irreplaceable natural resource, to maintain the economic integrity of the economic farm units comprising the commercial agricultural areas of the County, to implement the agricultural preservation policy of Section 16.50.010 of the Santa Cruz County Code, and to maintain and enhance the general welfare of the county as a whole by preserving and protecting agriculture, one of the County's major industries. Within the "CA" Commercial Agriculture Zone District, commercial agriculture shall be encouraged to the exclusion of other land uses which may conflict with it. (Ord. 2622, 1/23/79; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

(b) "A" Agriculture.

The purposes of the "A" Agriculture Zone District are to encourage and provide for noncommercial agricultural uses, such as family farming and animal raising, and to allow limited commercial agricultural activities, on the small amounts of agricultural land remaining in the County which are not designated as commercially suitable, but which still constitute a productive natural resource; to provide for agricultural uses of a higher intensity in rural areas than those allowed in the "RA" Residential Agricultural Zone District where such use is compatible with the surrounding land uses and the environmental constraints of the land; to maintain options for a

diversity of farm operations; to implement the agricultural preservation policy of Section 16.50 of the County Code; and to maintain productive open space and rural character in the county. (Ord. 1639, 9/21/71; 2450, 6/21/77; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

(c) "AP Agricultural Preserve.

The purposes of the "CA" Zone District shall apply to the "AP" Agricultural Preserve Zone District. The "AP" regulations are designated to apply only to lands located within an agricultural preserve established in accordance with the provisions of the California Land Conservation Act of 1965 as now enacted or as hereafter amended, and which are within the "AP" Zone District as of July 27, 1982. (Ord. 1283, 1/2/68; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

13.10.311(d) Interpretation of Provisions.

The provisions of this Chapter shall be liberally interpreted insofar as they apply to agricultural pursuits and services and shall not be deemed or construed to interfere with any normal accessory use conducted in conjunction therewith. It is the intention of the county to retain for commercial agricultural production, and to encourage the commercial agricultural use of, lands designated by the Board of Supervisors as Type 1, Type 2, or Type 3 Agricultural Lands on the map entitled "Agricultural Resources" on file with the Planning Department; to provide maximum protection to existing and future agricultural enterprises from restrictions which may be instituted later at the request of future residents; to restrict incompatible development on or adjacent to agricultural land; and to maintain the existing parcel sizes for parcels zoned "CA" and "AP", except where it is clearly demonstrated that any division of such parcels shall not diminish the productivity or in any way hamper or discourage longterm commercial agricultural operations on said parcels or adjoining or nearby parcels.

13.10.312 AGRICULTURAL USES

13.10.312(b) Allowed Uses.

The uses allowed in the agricultural districts shall be as

provided in the Agricultural Uses Chart below. A discretionary approval for an allowed use is known as a "Use Approval" and is given as part of a "Development Permit" for a particular use. The type of permit processing review, or "Approval Level", required for each use in each of the agricultural zone districts is indicated in the chart. The processing procedures for Development Permits and for the various Approval Levels are detailed in Chapter 18.10 PERMIT AND APPROVAL PROCEDURES. The Approval Levels given in this chart for structures incorporate the Approval Levels necessary for processing a building permit for the structure. Higher Approval Levels than those listed in this chart for a particular use may be required if a project requires other concurrent Approvals, according to Section 18.10.123. All Level V or higher Approvals in the "CA" and "AP" zone districts are subject to the special findings required by Section 13.10.314(a) in addition to those required in Section 18.10.230. (Ord. 3632, 3/26/85)

AGRICULTURAL USES CHART:

Key:
A = Use must be ancillary and incidental to a principal permitted use on the site
P = Principal permitted use (see Sec. 13.10.312(a)); no use approval necessary if "P" appears alone

1 = Approval Level I (administrative, no plans required)
2 = Approval Level II (administrative, no plans required)
3 = Approval Level III (administrative, field visit required)
4 = Approval Level IV (administrative, public notice required)
5 = Approval Level V (public hearing by Planning Commission required)
6 = Approval Level VI (public hearing by Zoning Administrator required)
7 = Approval Level VII (public hearing by Planning Commission and Board of Supervisors required)
- = Use not allowed in this zone district
* =
Level IV for projects of less than 2000 square feet;
Level V for projects of 2000 ro 20,000 square feet;
Level VI for projects over
BP= Building Permit Only

AGRICULTURAL USE CHART

USE	CA	A	AP
Livestock raising for food, fiber or animal production, including rabbits and other small animals under 100 per acre.	P	P	P
Kennels, commercial or private, for five or more dogs or cats over the age of four months subject to the provisions of 13.10.323	5	5	5

13.10.322 RESIDENTIAL USES

13.10.321 PURPOSES OF RESIDENTIAL DISTRICTS.

(a) General Purposes.

In addition to the general objectives of this Chapter (13.10.120) the residential districts are included in the Zoning Ordinance in order to achieve the following purposes:

1. To provide areas of residential use in locations and at densities consistent with the County General Plan.

2. To preserve areas for primarily residential uses in locations protected from the incompatible effects of nonresidential land uses.

3. To establish a variety of residential land use categories and dwelling unit densities which provide a choice of diversified housing opportunities consistent with public health and safety.

4. To achieve patterns of residential settlement that are compatible with the physical limitations of the land and the natural resources of the County and that do not impair the natural environment.

5. To ensure adequate light, air, privacy, solar access, and open space for each dwelling unit.

6. To maximize efficient energy use and energy conservation in residential districts, and to encourage the use of locally available renewable energy resources.

7. To provide adequate space for off-street parking of automobiles.

8. To provide areas of residential use consistent with the capacity of public services, the Urban Services Line and Urban/Rural Boundary and the reserve capacity policy of the Local Coastal Program Land Use Plan for tourist services. To minimize traffic congestion and avoid the overloading of utilities by preventing the construction of buildings of excessive size in relation to the land around them.

9. To protect residential properties from nuisances, such as noise, vibration, illumination, glare, heat, unsightliness, odors, dust, dirt, smoke, traffic congestion, and hazards such as fire, explosion, or noxious fumes. (Ord. 560, 7/14/58; 1092, 6/8/65; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83; 3501, 3/6/84)

(b) Specific "RA" Residential Agricultural District Purposes.

To provide areas of residential use where development is limited to a range of nonurban densities of single-family dwellings in areas outside the Urban Services Line, or-in Suburban/Urban Reserve areas inside the Urban Services Line; on lands suitable for development with adequate water, septic system suitability, vehicular access, and fire protection; with adequate protection of natural resources; with adequate protection from natural hazards; and where small-scale commercial agriculture, such as animal-keeping, truck farming and specialty crops, can take place in conjunction with the primary use of the property as residential. (Ord. 560, 7/14/78; 839, 11/28/62; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

(c) Specific "RR" Rural Residential District Purposes.

To provide areas of residential use where development is limited to a range of nonurban densities of single-family dwellings in areas having services similar to "RA" areas, but which are residential in character rather than agricultural due to the pattern of development and use in the area and/or the presence of constraints which would preclude the use of the

property for agriculture. (Ord. 653, 10/17/60; 3186, 1/12/82; 3344, 11/23/82 3432, 8/23/83)

(d) Specific "R-1" Single-Family Residential District Purposes.

To provide for areas of predominantly single-family residential development in areas which are currently developed to an urban density or which are inside the Urban Services Line or Urban/Rural Boundary and have a full range of urban services, or in Suburban/Urban Reserve areas at lower densities pending a full range of urban services. (Ord. 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

(e) Specific "RB" Single-Family Ocean Beach Residential District Purposes.

To accommodate single family dwellings on existing lots of record in the vicinity of the cliffs and the ocean beach; where lots abut on and obtain access from a street which is generally parallel to both the beach and the cliff, and which has an elevation of not more than 20 feet above sea level; and where either the seaward right-of-way line of the street or the seaward boundary line of the lots on the ocean side of the street abut open beachlands which are unobstructed to the mean high tide line. (Ord. 1418,

5/25/69; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

(f) Specific "RM" Multi-family Residential District Purposes.

To provide for areas of residential use with a variety of types of dwellings in areas which are currently developed to an urban density or which are inside the Urban Services Line or Urban/Rural Boundary and have a full range of urban services. (Ord. 839, 11/28/62; 1891, 6/19/73; 3186, 1/12/82; 3432, 8/23/83)

13.10.322 RESIDENTIAL USES.

(a) Principal Permitted Uses.

1. In the Coastal Zone, the principal permitted uses in the residential districts shall be as follows:

"RA" : single-family residential and agricultural

(rural)

"RR" : single-family residential (rural)

"R-1": single-family residential (urban)

"RB" : single-family residential (oceanfront, urban)

"RM": multiple-family residential (urban) including appurtenant accessory uses and structures

2. Principal permitted uses are all denoted uses requiring a Level IV or lower Approval or as otherwise denoted with the letter "P" in the footnotes to the Residential Uses Chart in paragraph (b) following. In the Coastal Zone, actions to approve other than permitted uses are appealable to the Coastal Commission in accordance with the provisions of Chapter 13.20 of the County Code relating to Coastal Zone Permits, and in some cases, as provided in Chapter 13.20, any development is appealable.

(b) Allowed Uses. The uses allowed in the residential districts shall be as provided in the following Residential Uses Chart below. A discretionary approval for an allowed use is known as a "Use Approval" and is given as part of a "Development Permit: for a particular use. The type of permit processing review, or "Approval Level", required for each use in each of the residential zone districts is indicated in the chart. The processing procedures for Development Permits and for the various Approval Levels are detailed in Chapter 18.10 PERMIT AND APPROVAL PROCEDURES. The Approval Levels given in this chart for structures incorporate the Approval Levels necessary for processing a building permit for the structure. Higher Approval Levels than those listed in this chart for a particular use may be required if a project requires other concurrent Approvals, according to Section 18.10.123.

RESIDENTIAL USES CHART:

Key:
A = Use must be ancillary and incidental to a principal permitted use on the site
P = Principal permitted use (see Sec. 13.10.312(a)); no use approval necessary if "P" appears alone

1 = Approval Level I (administrative, no plans required)
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- = Use not allowed in this zone district
* =
Level IV for projects of less than 2000 square feet;
Level V for projects of 2000 ro 20,000 square feet;
Level VI for projects over
BP= Building Permit Only

RESIDENTIAL USES CHART

USE	RA	RR	R-1	RB	RM
Agricultural uses, including					
Agriculture, small-scale commercial, such as the raising of specialty crops (see also Animal-Keeping)	P	--	--	--	--
Animal-related uses, including:					
Animal-keeping (subject to Section 13.10.643) (see also "Animal enclosures" above)	P	--	--	--	--
Cats and dogs	P:4 cats or dogs or combo	P:4 cats or dogs or combo	P:2 cats and 2 dogs per unit	P:2 cats and 1 dog per unit	P:2 cats and 1 dog per unit
Kennels for five or more	5	--	--	--	--

dogs or cats over the age of four months (subject to Section 13.10.642)					
Bee-keeping, commercial (see Section 13.10.700-B definition)	5	--	--	--	--

13.10.643 ANIMAL-KEEPING IN THE RESIDENTIAL-AGRICULTURAL ZONE DISTRICT

(a) The following minimum acreage standards are required when keeping animals in the Residential-Agricultural Zone District:

1. On a minimum site of one acre, not more than two per acre of horses, cows, or hogs, or a combination hereof; or

2. On a minimum site of one-half acre, not more than four per acre of sheep, goats, or a combination thereof; or one hundred per acre of fowl, rabbits, or similar small animals except mink; beehives;

3. On a minimum site of ten acres, the number of animals permitted is not limited, except that no more than six brood sows may be kept on any site.

(b) The provisions of Section 16.22.060, pertaining to erosion control, shall apply. (Ord. 1891, 6/19/73; 3186, 1/12/82; 3344, 11/23/82; 3432, 8/23/83)

(c) For purposes of interpretation, a cow, llama, pig, or other large animal may equal a horse.

13.10.700 DEFINITIONS.

For the purposes of this Chapter certain terms used herein are defined as follows:

(a) All words in the present tense shall include the future tense. All words in the singular number shall include the plural number and all words in the plural number shall include the singular number, unless the natural construction of the wording indicates

otherwise. The word "shall" is mandatory and not directory.

(b) All terms used in this chapter shall be as defined in the General Plan, including the Local Coastal Program Land Use Plan glossaries, except as noted below.

13.10.700-A "A" DEFINITIONS.

Agriculture. The art or science of cultivating the ground, including the harvesting of crops and the rearing and management of livestock; tillage; husbandry; farming; horticulture.

13.10.700-K "K" DEFINITIONS

Kennel. Any lot, building structure, enclosure, premises whereupon or wherein are kept five or more dogs, cats or similar small animals over the age of four months in any combination for more than five days, whether such keeping is for pleasure, profit, breeding, or exhibiting and including places where dogs and cats or similar small animals in any combination are boarded, kept for sale or kept for hire.

Appendix H

CALIFORNIA ATTORNEY GENERAL'S OPINIONS

Opinion No. CR 76-23 -- February, 1977
60 Ops. Cal. Atty. Gen. 83

SUBJECT: LOCAL BUILDING CODE ORDINANCE-STATE HOUSING LAW

Opinion by: Evelle J. Younger, Attorney General
Steven H. Kaufmann, Deputy

At p. 90 (in part):

It does not seem reasonable that the Legislature in enacting Goverment Code section 25132 in 1975 intended thereby to make violation of every outstanding and future county ordinance in California a criminal offense, regardless of the purpose of the ordinance or the intent of the board of supervisors adopting the ordinance. Accordingly, upon reason and authority, we conclude that Government Code sections 25132 and 36900 make the violation of a city or county ordinance either a misdemeanor or an infraction only when the violation is declared to be a misdemeanor or infraction by express ordinance language. In the absence of such criminal penalties violations of a city or county ordinance may be enforced by means of an appropriate civil remedy. *Matter of Ellsworth*, 165 Cal. 677, 681 (1913); *City of Stockton v. Frisbie & Latta, supra*, 93 Cal. App. 277, 295.

Opinion No. 80-607 -- December 23, 1980
63 Ops. Cal. Atty. Gen. 905

SUBJECT: RECORDING OF DOCUMENTS BY BOARD OF SUPERVISORS OF GENERAL LAW COUNTY

Opinion by: George Deukmejian, Attorney General
Victor D. Sonenberg, Deputy

At p. 912:

Consequently a general law county may provide for the recording of those documents which are not expressly specified or included in any of the state recording statutes[4], unless, of course, the recording of such documents would violate some

other state statute such as one that requires confidentiality of the documents in question. (See, e.g., Welf. & Inst. Code § 10810 making welfare recipients records confidential.) As noted, local law which duplicates or contradicts state law is in conflict with such law and is thus void.

At p. 912, n. 4:

We are informed by the requester of this opinion that the county as a means of enforcement is desirous or recording notices of violations of various building, health, subdivision, and zoning laws which have been found to exist by the county inspectors. In this regard we would note that such notices reflect what are merely charges of violations and under no rule of law do they operate to encumber title to or any right of possession of property. Such notices would thus not be an "instrument or judgment affecting the title to or possession of real property" as specified in section 27280. This conclusion is supported by the reasoning in *Brown v. Johnson* (1979) 98 Cal. App. 3d 844, where the court held that a notice of a vendor's lien on real property was not an instrument affecting property that could be recorded under section 27280(d). In that case, the court stated:

> "'Such lien ... is not a specific absolute charge upon the property, but only an equitable right of the vendor to resort to in case the purchase money is not paid ...' A vendor's lien is a mere personal privilege to resort to land as a means of enforcing a land sale contract. [Citation] The right to resort to a vendor's lien must be established by suit; the lien is of no operative force or effect until established by decree of court and may be asserted only by a suit in equity for the purpose of obtaining such a decree. [Citation]
>
> "... The notice thus did not create the lien nor did it affect the title or possession of the property. The notice was therefore not authorized to be recorded ..." (*id* at pp. 850-851); see also *Dreifus v. Marx* (1940) 40 cal. App. 2d 461, 466; writ of attachment not included under recording statute.)

It would appear that a notice of violation of building laws, etc., which may or may not result in a court order, which itself would not necessarily affect title or possession, is an instrument that has an even more remote effect upon title or

possesion than a notice of a vendor's lien, and would thus not be covered by section 27280(a).

In addition to our conclusion that notices of violation are not included in the general provisions of 27280(a), we also assume in view of the question asked in the opinion request, that the proposed ordinance would not provide for the recording of these types of documents that are already specifically designated under particular state statutes. For example, see section 66499.36 which provides for the recording of a notice of violation of subdivision laws.

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

(3)

No. 96-570

In The

Supreme Court of the United States

October Term, 1996

ARTHUR R. SORKIN and S. DIANE SMITH,

Petitioners,

vs.

COUNTY OF SANTA CRUZ, a political subdivision of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

DWIGHT L. HERR, County Counsel
HARRY A. OBERHELMAN III,
Assistant County Counsel*
County of Santa Cruz
701 Ocean Street, Room 505
Santa Cruz, CA 95060
(408) 454-2040

Attorneys for Respondent County of Santa Cruz

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATUTE

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PRELIMINARY STATEMENT

This civil action was filed by Respondent, the County of Santa Cruz, seeking to enforce its zoning regulation which prohibits the keeping of more than four dogs on residentially zoned parcels. After a court trial in August 1992, the trial court rendered judgement for the County and issued a permanent injunction. The judgement was affirmed by the California Court of Appeal, Sixth Appellate District, in an unpublished opinion.

SUMMARY OF ARGUMENT

Petitioners seek review in this court on three issues. Their petition should be denied as the California Court of Appeal neither decided any unsettled important question of federal law which should be settled by this Court nor decided a federal question in a manner which conflicts with applicable decisions of this Court. Supreme Court Rule 10.1(c).

(1) Petitioners contend that the Notice of Violation recorded by the County violated due process. A ruling in favor of Petitioners on this issue would not alter the decision in this case. Petitioners are requesting an advisory opinion from this Court based on an undeveloped trial court record.

(2) Petitioners' contend that the Court of Appeal misapplied the "rational basis" standard in rejecting their equal protection challenge to the zoning regulation. This Court's precedent is well established in the zoning context that the classification must be upheld if there is any

reasonable conceivable state of facts that could provide a rational basis.

(3) Petitioners contend that they were not afforded criminal standards of due process in their civil injunction trial. This contention was properly rejected by the Court of Appeal for the failure to raise the issue in the trial court. Notwithstanding the failure to raise, the Court of Appeal correctly found that the level of due process which Petitioners received in the trial Court was consistent with this Court's jurisprudence.

STATEMENT OF THE CASE

The Court of Appeal's opinion adequately sets forth the facts for purposes of this petition. Petitioners' recitation of the case in their Petition for Certiorari misstates and omits facts which are key to an understanding of the decision of the Court of Appeal.

Petitioners housed at times thirty (30) dogs on their real property. Petitioners' fail to tell this Court that Respondent's residential zoning regulations, applicable to Petitioners' real property, expressly prohibit the keeping of more than four dogs. See Appendix G-22, Appendix to Petition for Writ of Certiorari. Both the trial court and the Court of Appeal found this express limitation on the numbers of dogs which may be kept in a residential zone district decisive in this case. See Appendices A-3 and B-3, Appendix to Petition for Writ of Certiorari.

Petitioners' mistake evidence presented at trial for findings of fact in connection with the defense of estoppel. Evidence was presented at trial that Petitioner Sorkin spoke by telephone with an unidentified Planning Department employee in 1986 who reportedly told him that there was no limit on the number of *animals* including dogs which could be kept on his property. Petitioners then allege that Respondent's Planning Department thereafter changed its interpretation and asserted that the number of *dogs* was limited to four. This allegation was disputed at trial; Respondent presented evidence that the restriction on the number of dogs at all relevant times in the past had always been four and that no interpretation was ever necessary on this point. The trial court held, without making a finding of fact, that Petitioners failed to meet their burden of proof as to their defense of estoppel. See Appendix B-5, Appendix to Petition for Writ of Certiorari.

Finally, Respondents inaccurately state that the Notice of Violation posted on their property and mailed to their address was a criminal citation under California Penal Code Section 836.5 and 853.6. The Notice of Violation gives the property owner notification of the alleged code violation, informs them of the right to request a meeting to contest the allegation and states the intent to record a Notice of Violation with the County Recorder. See Santa Cruz County Code Section 13.10.285, Appendix G-14, Appendix to Petition for Writ of Certiorari. Petitioners were never cited or charged with any criminal offense in connection with the keeping of some thirty (30) dogs on their property.

ARGUMENT

I

PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A QUESTION REGARDING THE SEIZURE OF REAL PROPERTY WITHOUT NOTICE OR HEARING

Petitioners suggest that the recordation of the Notice of Violation was without notice or hearing and that the Court of Appeal declined to order affirmative relief nor consider the issue of damages.

(A) Whether or not the Notice of Violation was recorded by Respondent with adequate due process has no effect on the trial court's judgement, affirmed by the Court of Appeal, enjoining Respondents from keeping more than four dogs their property.

(B) The Notice of Violation procedure was not made an issue at trial and therefore no record was developed as to the County's interest in adopting the procedure it did nor the nature of the safeguards provided.

(C) Petitioners' real property was not "seized" by the recordation of the Notice of Violation.

I-A

DUE PROCESS CHALLENGE TO NOTICE OF VIOLATION PROCEDURE WAS NOT DECIDED BY THE COURT OF APPEAL AND HAS NO EFFECT ON THE JUDGEMENT FOR RESPONDENT

The Notice of Violation recorded by Respondent has absolutely no impact on the trial court judgement or the decision of the Court of Appeal. Recordation of the

Notice of Violation was not a condition precedent to initiating this civil injunction action. The Notice of Violation was before the trial court based only on Petitioners' argument that the prayer, contained in their answer to the complaint, requested "such other and further relief as the court deems just", which therefore permitted Petitioners to request from the trial court a rescission of the Notice.[1] The trial court correctly held that since a zoning violation had been proved and injunctive relief was appropriate, Petitioners were not entitled to "such other and further relief". See Appendix B-6, Appendix to Petition for Writ of Certiorari. If the trial court had found that no zoning violation existed and gave judgement to Petitioners, then it could arguably have ordered an expungement of the Notice of Violation based on the prayer contained in the answer.

This Court has held that it does not render advisory opinions. *California v. Freeman*, 488 U.S. 1311, 1314, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989); *Communist Party v. S.A.C. Board*, 367 U.S. 1, 71-72, 81 S.Ct. 1375, 6 L.Ed.2d 625 (1961); *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789 (1945). A ruling that does not provide any relief to the prevailing party ignores the duty of

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[1] Petitioners also contend that the County of Appeal failed to consider the issue of damages arising out of the alleged failure to provide Due Process. Petitioners never sought damages in the trial court. No cross complaint was ever filed. Relief sought under the prayer in an answer is insufficient to bring the question of a defendant's monetary damages into the case. California Code of Civil Procedure Section 428.10; *Moskovitz v. Le Francois*, 121 Cal.App. 310, 313, 8 P.2d 1049 (1932).

the federal courts " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Oil Workers v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960), quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895).

The trial court found that Petitioners kept more than four dogs on their property and that Respondent's zoning regulations clearly prohibited such a land use. The Court of Appeal agreed that the zoning regulations limited the numbers of dogs and affirmed the judgement. The validity of the process by which the Notice of Violation was recorded has no impact on the judgement rendered in favor of Respondent by the trial court. Entertaining this Petition will engage the Court in rendering an advisory opinion.

I-B

NOTICE OF VIOLATION IS NOT A SEIZURE OF PETITIONERS' PROPERTY

Assuming that the issue of the validity of the Notice of Violation were before this court, the Court of Appeal decision does not conflict with applicable decisions of this Court. The Notice of Violation procedure is set forth in Santa Cruz County Code Section 13.10.285.[2] The Notice

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[2] Petitioners contend that the Administrative Hearing Officer procedure, set forth in County Code Section 1.12.070(D) was adopted by the County in recognition that its notice and

of Violation[3] is first posted on the property and then a written notice of intent to record a Notice of Violation is mailed to the property owners. The notice contains advice to seek a meeting if the owners dispute the existence of the zoning violation. No meeting was ever requested or held in Petitioners' case. Recordation takes place to give notice to any potential buyer of the existence of zoning/building code violations.

Recordation of the Notice of Violation procedure under Santa Cruz County Code Section 13.10.285 does not constitute a seizure of property under *U.S. v. James Daniel Good Real Property*, 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). In *James Daniel Good*, this Court addressed the civil forfeiture of realty where the property owner lost the ability to possess, occupy, sell, use or rent the real property seized by the government. In this case, a recorded Notice of Violation does not restrict Landowners from possessing, occupying, using, renting or selling their real property. Petitioners presented evidence that they could not refinance their property unless and until the Notice of Violation was removed, i.e., by coming into compliance with the zoning regulations. However,

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hearing procedures applicable to Notices of Violation did not meet Due Process. The procedures for a hearing officer do not apply to the decision to record the Notice of Violation, made under Section 13.10.185, rather they constitute a remedy for seeking compliance for any county code violation and is alternative to a civil action such as was used in this case. The Notice of Violation procedure remains unchanged.

[3] The Notice of Violation is the title given both to the paper that is posted on the property and to the document which is ultimately recorded in the official records.

Petitioners were not restricted from exercising those facets of property ownership which this Court found to be withheld in *James Daniel Good*, 114 S.Ct. at 503. Indeed Petitioners admit that the Notice of Violation has no impact on their ability to sell their property because a sale would terminate the violation since the dogs, being personal to Petitioners' use of the property, would be removed before transfer of the property. (See Petition for Writ of Certiorari, page 11). The other cases referenced by petitioners are not similar. Recordation of the Notice of Violation is not a prejudgement monetary lien as in *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), nor the repossession of personal property as in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

I-C

COUNTY'S NOTICE OF VIOLATION PROCEDURE COMPORTS WITH DUE PROCESS

The record below is inadequate for this court to address the issue of due process under the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 95 S.Ct. 893, 47 L.Ed.2d 18 (1976). No evidence was taken as to the risk of erroneous deprivation by use of the procedures set forth in the County's Notice of Violation process, or the probable value, if any, of additional or substitute procedural safeguards. Nor was a record developed describing the County's interest, including the fiscal and administrative burdens that additional or substitute procedures would require. The Notice of Violation is

designed to give notice to potential buyers of the existence of code violations on property. The private interest affected is minimal to most property owners. There is no abridgement of the possession, use, sale or rental of the affected property.

However, the record does reflect that petitioners received some level of notice and an opportunity to be heard prior to the recordation of the Notice of Violation. The notice of intent informs the property owner of the alleged violation and gives an opportunity to seek a meeting to present evidence to the contrary. The notice is given by mail to the last address as set forth in the tax records and is posted on the property. The Notice of Violation was recorded after posting and mailing notice of Respondent's intent to record. Indeed, Petitioners were well aware of the County's contention that they were violating the zoning regulations long before the Notice of Violation was recorded.[4]

II

EQUAL PROTECTION ANALYSIS USED BY THE COURT OF APPEAL IS CONSISTENT WITH THIS COURT'S DECISIONS

Petitioners contend that the Court of Appeal's use of the "rational basis" equal protection analysis disregards the approach used by this Court in the regulatory takings

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[4] Petitioner Sorkin responded to the posting of the Notice of Violation on the property and denied the existence of any violation. The County Planning Department official responded in writing and re-affirmed the County's position.

area. Their argument is unsound. This action does not involve a regulatory taking, but is a zoning enforcement civil injunction action. Petitioners cite the appropriate equal protection standard, *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), which was used by the Court of Appeal. See Appendix A-4, Appendix to Petition for Writ of Certiorari. *Heller* states that: "Instead a 'classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " 125 L.Ed.2d at p. 270. "A state moreover has no obligation to produce evidence to sustain the rationality of a statutory classification." 125 L.Ed.2d at 271. "A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." 125 L.Ed.2d at 271.

It is not only rational, and devoid of speculation, but even finds some support in the trial court record, that dogs run in packs, attack other animals and produce noise and excrement. Those grounds are more than sufficient under the teaching of *Heller* to support the limitation on dogs in residential zone districts. Petitioners contend that a good reason must be advanced to support the legislative classification. Good reason judged by whom? A court? But this Court has stated that the judiciary should not act as a superlegislature judging the wisdom or desirability of legislative policy. Deciding whether a reason is a "good" reason is precisely the activity which this Court has long avoided in its equal protection analysis.

Petitioners cite *Romer v. Evans*, 517 U.S. ___, 116 S.Ct. 2326, 134 L.Ed.2d 855 (1996) which addressed a constitutional amendment which restricted the rights of homosexuals. This court in *Romer* did not alter its equal protection analysis in holding that Colorado, even under the rational basis test, could not bar the application of existing laws to homosexuals. 134 L.Ed.2d at p. 865. This Court also held that the initiative statute in *Romer* exhibited a desire to harm a politically unpopular group. Petitioners, as dog owners, are not members of any suspect classification which this court has heretofore recognized.[5] Nor is there any evidence whatsoever that the County's zoning regulation limiting the numbers of dogs was intended to harm a identifiable political group or any suspect class. The zoning regulations do not prohibit all dogs, only dogs in excess of four. The Court of Appeal decision does not conflict with any decision of this Court.

III

COURT OF APPEAL PROPERLY REJECTED PETITIONERS' ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL THAT CRIMINAL DUE PROCESS APPLIES TO THIS CIVIL INJUNCTION ACTION

Petitioners assert in their Petition before this Court what they asserted before the Court of Appeal but failed to assert before the trial court; that criminal law due process safeguards should apply in this civil injunction

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[5] Petitioners for the first time in this litigation call themselves members of a suspect classification. The allegations used by Petitioners to urge their membership are wholly outside the trial court record.

case. Despite the failure to raise this contention in the lower court, application of precedent from this Court clearly leads to the conclusion that the civil injunction proceeding is civil rather than criminal in nature. *In re Winship* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), (Juvenile charged with an act which is a crime if committed by an adult); *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988), (use of a legislative presumption in proceedings for contempt for failure to pay child support); *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), (civil sanction after criminal conviction where the sanction was punishing not remedial).

Petitioners were confronted with an injunction and civil penalties in this action. The trial court issued a mandatory injunction and awarded $2,000 in civil penalties.[6] There was no potential for incarceration. The purpose of this action was remedial, to obtain compliance with the zoning regulations, not to punish. Petitioners have not demonstrated that the Court of Appeal decision conflicts with this Court's decisions.

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[6] As of the date of this Petition, Petitioners have not complied with the terms of the permanent injunction.

CONCLUSION

For the reasons set forth in this opposition, the Petition for Writ of Certiorari should be denied.

Dated: November 8, 1996

Respectfully submitted,

DWIGHT L. HERR
County Counsel, County of Santa Cruz
HARRY A. OBERHELMAN, III
Assistant County Counsel

Attorneys for Respondent County of Santa Cruz

Supreme Court, U.S.
F I L E D
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CLERK

No. 96-570

In The
Supreme Court of the United States
October Term, 1996

Arthur R. Sorkin,
S. Diane Smith,

Petitioners,

v.

County of Santa Cruz,

Respondent.

Petition for Writ of Certiorari
To The California Court of Appeal,
Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION

Arthur R. Sorkin
S. Diane Smith
12340 Indian Trail Road
Los Gatos, CA 95030
Telephone: (408) 867-5830

In Propria Persona

Respondent County of Santa Cruz's arguments presented in its Brief in Opposition are without foundation. The County's rhetoric overwhelms the realities of the case, and the County's Brief has liberally rewritten the facts of the case.

The County appears to claim that the decisions below are based on adequate state law and that there are no federal issues involved. The record below shows this to be clearly false. All issues, even when referenced by state cases, are inextricably intertwined with federal constitutional issues, providing a basis for this Court's jurisdiction, *Ohio v. Robinette*, Case No. 95-891, November 18, 1996.

I A DECISION ON DENIAL OF DUE PROCESS IS NOT ADVISORY

The County asserts that there was no taking because Petitioners were able to continue to occupy their home. This assertion in not in accord with the decisions of this Court in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), and *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991). In particular, Good was able to occupy his home and Doehr was able to continue to occupy his home during the pendency of their cases. This did not excuse the denial of due process.

The County asserts that a decision on the question of the denial of due process involved in the County's placing a cloud on the title to Petitioners' home without notice and hearing would not affect the judgment and would be purely advisory. This is incorrect. While it would not affect the injunctive portion of the judgment, it would have an effect on the rest of the judgment. The judgment awards the County both civil penalties and costs, and those would, at least, be offset by any damages owing to Petitioners resulting from the denial of due process, as was ordered by the U.S. Court of Appeals for the Ninth Circuit (and affirmed by this Court) in *Good*.

Governmental officials need to know what the limits are to their power to interfere with real property rights in the name of "code enforcement". This is clearly an important issue of law that should be decided by this Court.

II INTERMEDIATE SCRUTINY IS REQUIRED FOR CONSTITUTIONAL CHALLENGES TO REGULATORY TAKINGS

The County's Brief in Opposition relies heavily on *Heller v.* Doe, 113 S. Ct. 2637 (1993), for the proposition that only minimal scrutiny is required in an equal protection challenge to legislation. However, *Heller* is inapposite. In *Heller*, this Court specifically declined to consider intermediate scrutiny, because it had never been raised below, *Heller* at 2642. *Heller* also does not involve a takings claim.

In contrast to *Heller*, Petitioner's Answer raised the issue of regulatory takings, and intermediate scrutiny was specifically argued by Petitioners in both the trial court and Court of Appeal. Petitioners argued, *inter alia*, that an intermediate standard of scrutiny was *required* for regulatory takings by zoning[1]. However, both the trial court and the Court of Appeal chose to apply the minimal standard of scrutiny, i.e., "rational basis." In their petition for rehearing, Petitioners pointed out explicitly that the Court of Appeal's use of "rational basis" was incorrect, but the Court of Appeal declined to grant rehearing.

The County is also incorrect when it argues that the courts never scrutinize the reasons for legislation if any rational basis can be imagined. This Court has done so in numerous cases, e.g., *Romer v. Evans*, 116 S. Ct. 1621 (1996). A suspect class is not required; under-inclusiveness and over-inclusiveness, coupled with the lack of a "good reason", made the apparent aim of the legislation suspect in *Romer*. The decision in *Romer* was not based upon treating homosexuals as a suspect class, which would have required the highest level of scrutiny. A similar situation to *Romer* applies in this case, because the County's zoning restriction is both under-inclusive and over-inclusive and lacks a "good r`ason", i.e., a real and substantial relationship to a legitimate governmental purpose.

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[1] Petitioners used the term "rational relationship" or "rationally related" to indicate higher than minimal scrutiny, as this was the term used by certain California Courts of Appeal, e.g., *Elysium Institute, Inc. v. County of Los Angeles*, 232 C.A.3d 408, 4526 (1991).

In both the trial court and the Court of Appeal, Petitioners argued that singling out dogs and cats for special regulation, among all other animals similarly situated, was not based upon any inherent difference and, therefore, violated equal protection. The County's Brief in Opposition raises the issue of animals running in packs, attacking other animals, and producing noise and excrement in support of their position. This argument is specious. Since other animals besides dogs and cats, e.g., geese and buffalo, have identical characteristics, and those animals are completely unregulated by the County's zoning ordinances and are allowed in unlimited numbers on Petitioners' property, the County's argument actually supports Petitioners' position that the special zoning restriction on dogs and cats does not bear a real and substantial relationship to a legitimate governmental purpose.

Following this Court's recent decisions in *Nollan* and *Dolan*, some California courts have begun to apply intermediate scrutiny to takings cases. The California Supreme Court, citing *Nollan v. California Costal Comm'n*, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), applied intermediate scrutiny to a takings claim in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), after that case was remanded by this Court in a memorandum decision requiring *Dolan* to be considered, 114 S. Ct. 2731 (1994). In *Santa Monica Beach, LTD. v. Superior Court*, 42 Cal. App. 4th 1228 (1996), the Second District Court of Appeal suggested that a rent control law might be subject to intermediate scrutiny "as applied" because it "goes too far." A recent article even proposed that all land use regulations should be subject to the *Nollan-Dolan* analysis requiring intermediate scrutiny, *Nollan and Dolan: The End of Municipal Land Use Extortion - A California Perspective*, Jason R. Biggs, 36 Santa Clara Law Review 515, 554 (1996). In contrast, the land use analysis used below in this case was based on only the minimal level of scrutiny.

The question of level of scrutiny was properly raised below and is squarely before the Court. The lack of consistency in the decisions of the lower courts needs to be resolved by this Court.

III DUE PROCESS REQUIRES THAT CRIMINAL STANDARDS OF STATUTORY CONSTRUCTION BE APPLIED IN A CIVIL CASE WHEN THERE IS AN UNDERLYING CRIMINAL OFFENSE

The cases cited by the County in their Brief in Opposition actually support Petitioners' argument that elements of criminal due process can be required in a civil setting[2]. The County's analysis of their cases is faulty and the nature of the references is misstated. None of the County's references support the County's contention that a case in which a governmental entity seeks a permanent injunction for an alleged code violation, where the alleged code violation is also a misdemeanor, is purely civil.

While the term "rule of lenity" was not used in the trial court, the ambiguity in the Santa Cruz County Code arising from the conflict between Santa Cruz County Code §§13.10.322(b) and 13.10.643(a)(3) was raised in the trial court. It was argued by Petitioners at trial that the ambiguity should be resolved in Petitioners' favor because the Code sections in question were unconstitutionally vague.

Further, the trial court allowed Petitioners to invoke their Fifth Amendment privilege against self-incrimination when they testified at trial. This clearly shows that the trial court understood that there was a criminal offense involved in this case, even though the sanctions sought by the County were civil. However, the trial court failed to extend its application of criminal due process to its analysis of statutory construction.

On appeal, Petitioners argued, because of the underlying criminal offense, that the trial court erred in not applying criminal standards of statutory construction, including the rule of lenity and the void-for-vagueness test. To the extent it had not

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[2] The County asserts in a footnote that Petitioners have not complied with the permanent injunction as of this date. This assertion is correct. A mandatory injunction is automatically stayed under California law while appeals are pending. Petitioners fail to see the relevance of the County's assertion to the important questions of law raised in the Petition for Writ of Certiorari.

been raised in the trial court, this point was raised under the exception stated in *Hale v. Morgan*, 149 Cal. Rptr. 375 and *Fane v. Edenfield*, 945 F. 2d 1514, affirmed 113 S. Ct. 1792 (1993), allowing pure questions of law to be raised for the first time on appeal.

The Court of Appeal, reviewing statutory construction *de novo*, decided that there was no ambiguity, because it could resolve the conflicting provisions by inferring legislative intent. As a result, the Court of Appeal's decision did not directly address the rule of lenity or unconstitutional vagueness. However, the Court of Appeal should have, because the existence of conflicting provisions of the Santa Cruz County Code necessarily imply an ambiguity, requiring the rule-of-lenity to be applied, *U.S. v. Thompson/Center Arms Company*, 112 S. Ct. 2102 (1992). Similarly, the ambiguity coupled with the fact that the Court of Appeal had to resort to an analysis of inferred legislative intent to resolve the conflicting Code provisions implies that the void-for-vagueness test stated in *Grayned v. City of Rockford*, 92 S. Ct. 2294 (1972) and *Kolender v. Lawson*, 103 S. Ct. 185, should have been applied.

The nation's lower courts are in need of guidance as to the appropriate standard of statutory construction to apply in civil cases where there is an underlying criminal offense.

CONCLUSION

Petitioners respectfully submit that the Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal for the Sixth Appellate District.

Dated: November 20, 1996

Arthur R. Sorkin
S. Diane Smith
12340 Indian Trail Road
Los Gatos, CA 95030
Telephone: (408) 867-5830

In Propria Persona